Legal Ethics: Some of This and Some of That

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I. Introduction

The materials in this outline are intended to facilitate instruction on legal profession topics. All of the materials are fairly recent. They come from a variety of sources and from a number of jurisdictions. Many of them tell stories, which I like to use, because stories can help illustrate the application of legal profession rules and concepts, and because they can, at times, can survive in memory.

II. News

A. Bitcoin

According to an entry in the *ABA/BNA Lawyers' Manual on Professional Conduct,* more large law firms are accepting bitcoin payments for their legal services. *See* Sara Merken, *More Law Firms Are Accepting Bitcoin Payments*, 33 Law. Man. Prof. Conduct 535 (2017):

> Representatives from firms such as Steptoe & Johnson LLP, Frost Brown Todd LLC, and McLaughlin & Stern LLP told Bloomberg BNA that they started the new payment option to meet the demand of clients that deal with cryptocurrency assets. Accepting bitcoin may also help the firms attract new clients, they said.

> Technology and startup companies and those in the payments and intellectual property fields have been using bitcoin to pay generally smaller firms for legal services for years. Larger firms more recently have stepped into this space, and a wider variety of law firms are expected to accept bitcoin as clients become more comfortable using the currency, attorneys contacted by Bloomberg BNA said.
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> The number of law firms accepting the currency "has continually increased each year," Ashkaan Hassan, founder and lead attorney at Beverly Hills, Calif.-based boutique firm NuLegal, told Bloomberg BNA in an email.
>
> NuLegal has been accepting bitcoin payments since 2012. Hassan said he is hopeful that bitcoin "will become the dominant payment form in the future."

B. Lawyers Bill Fewer Hours Than a Decade Ago

A Georgetown law school report said that the average attorney bills 156 fewer hours than he or she did ten years ago. The report estimated that this translates into an annual loss of $74,100 per lawyer.

If you do some quick math on this, you will conclude that there is a pretty high average hourly rate baked into the numbers.

The calculation was based on a rate of $475 per hour, a figure that comes from averaging the rates of lawyers ranging from associates to equity partners for the law firms that were part of the study, which were 56 of the firms in the American Lawyer top 100, 47 in the second-tier, and 65 mid-size firms.

According to the study,

> Flat client demand, declining profit margins, weaker bill collection and lower market share due to alternative legal service providers are undermining firm profitability, the "2018 Report on the State of the Legal Market" concludes. Despite this underwhelming climate, rates edged up.

Elizabeth Olson, *Lawyers Bill Fewer Hours Than a Decade Ago: Report* , 34 Law. Man. Prof. Conduct 42 (2018).

C. Malpractice

According to a panel at the 17th annual Legal Malpractice & Risk Management conference, conflicts of interest are the largest source of malpractice claims for large firms. In contrast, small to medium-sized firms most often get sued for substantive mistakes.

The information comes from an ABA Profile of Legal Malpractice Claims and from a study conducted by Ames & Gough, an insurance brokerage.

> Which areas of practice generate the most claims against smaller firms? A poll of the [conference] audience predicted it would be trusts and estates, but the ABA study showed trust and estates generating only 12 percent of the claims. Plaintiffs' personal injury work generated almost one fifth of the claims in the 2015 study, followed by real estate and family law. Real-estate claims actually dropped….
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> In larger firms, business transactions generate the majority of claims.
>
> One panelist said that "We are seeing more claims for scrivener error and for breach of fiduciary duty," … And transfers of wealth within the U.S. will probably mean an increase in trusts and estates claims in the next few years ….

Elizabeth J. Cohen, *Conflicts, Mistakes Drive Legal Malpractice Claims*, 34 Law. Man. Prof. Conduct 158 (2018)

D. Texas Rules

On March 1, 2018, in order to comply with an Act of May 28, 2017, set forth in SB 302, the Texas Supreme Court issued an order giving preliminary approval to some amendments to rule 8.03 of the Texas Disciplinary Rules of Professional Conduct. The rule on reporting professional misconduct.

One of the amendments requires lawyer who have received criminal sanctions for barratry; any felony; or a misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property to notify the chief disciplinary counsel within 30 days.

Another amendment requires equally prompt notice of any discipline by the attorney regulatory agency of any other jurisdiction. More specifically:

> (e) A lawyer who has been convicted or placed on probation, with or without an adjudication of guilt, by any court for barratry, any felony, or for a misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property— including a conviction or sentence of probation for attempt, conspiracy, or solicitation— must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.
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> (f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.

http://www.txcourts.gov/media/1440719/189030.pdf

At the same time, in order to comply with the same legislation, the court entered an order giving preliminary approval to some amendments to the Texas Rules of Disciplinary Procedure. Among other things, these amendments included provisions relating to issuance of subpoenas by the office of chief disciplinary counsel, and some detailed guidelines for imposing sanctions. *See* http://www.txcourts.gov/media/1440720/189031.pdf

These amendments were to have taken effect on 1 June 2018, following public a public comment period. However, on 31 May 2018, the Texas Supreme Court entered an order delaying implementation pending further order of the court. Apparently the court received lots of comments, at least some of which expressed concerns over the provisions regarding investigatory subpoenas. *See* https://www.law360.com/articles/1049213/texas-disciplinary-rule-changes-delayed-after-attys-object

On 21 June 2018, the court issued final orders with respect to the new rules. There were some adjustments in the revised rules of disciplinary procedure, including with respect to investigatory subpoenas. *See* http://www.txcourts.gov/supreme/administrative-orders/rules-advisories/

III. Cases and Ethics Committee Opinions

A. Criminal Conduct

1. Animal Cruelty

In re Pastor
60 N.Y.S.3d 685 (App. Div. 2017) (per curiam)

Attorney Anthony Pastor killed his girlfriend's dog. According to the reported opinion

> respondent's repeated blows to the dog "showed almost incomprehensible violence, and malice," that the dog was in "excruciating pain" up until she lost consciousness while respondent "sat down at his computer in the most cold blooded manner, and went to work, knowing that the dog lay dying, ... on the floor behind him."

60 N.Y.S.3d at 685. After a jury trial, he was convicted of aggravated cruelty to animals (a felony) and of "overdriving, torturing and injuring animals" (a misdemeanor). He was sentenced to two years of imprisonment on the felony count and one year on the misdemeanor count, to run concurrently, was required to register on an animal abuse registry, and was banned from owning an animal for ten years.

He was also subject to lawyer disciplinary proceedings. According to New York Judiciary Law § 90(4)(b),

> Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the

> appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

60 N.Y.S.3d at 686. This procedure was invoked in this case, and Pastor's name was stricken from the roll of attorneys.

2. Stealing from the Law Firm v. Stealing from Clients

In re Barrett
391 P.3d 1031 (Utah 2017)

Attorney Joseph Barrett, who was employed by the Snow law firm, provided services to a couple of clients in different matters. He did some criminal defense and collection work for one client (Williams) and some custody work for another (Peterson).

As time went on, Barrett asked his firm to write off a portion of the amounts owing from the clients.

However, according to the reported opinion, Williams and Peterson performed construction work on Barrett's home and yard in exchange for legal services. Barrett also received a $3500 payment from Williams that he deposited into his personal account.

Separately, Barrett requested that the firm reimburse him for a business development lunch in California that he did not actually attend. Barrett said that his wife had attended the lunch and that he had "discussed business matters with a potential client over a phone call that took place during the lunch." 391 P.3d at 1033.

The law firm confronted Barrett about some of his reimbursement requests and also reported him to disciplinary authorities. In subsequent proceedings before the district court, Barrett was found to have accepted payment and construction services in exchange for his legal work, thereby misappropriating firm funds. The district court concluded that this conduct violated Rule 8.4(c), which states that "[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation." He was also found to have violated Utah Rule 8.4(c) with respect to his request for reimbursement for the lunch in California, because he had withheld information that would have permitted the firm to evaluate its legitimacy.

The matter came before the Utah Supreme Court, which concluded that the factual findings of the district court were correct. It went on to consider other aspects of the case, including whether the determination of the district court that Barrett be suspended from practice was the appropriate sanction.

Referring to an earlier case, *In re Ince*, 957 P.2d 1233 (Utah 1998), the court said that

> not all misappropriation is created equal. Misappropriation of firm funds does not "undermine the foundations of the profession and the public confidence" in the same way that misusing client funds does. ... A presumption of disbarment for intentional or knowing misappropriation of client funds is necessary to protect the "foundations of the profession and the public confidence that is essential to the functioning of our legal system," and we have placed it among the top of our sanctionable offenses as a way of putting attorneys on notice that such actions are "always indefensible." .... But the same policy concerns do not arise where no client money is at issue, and we want to leave no doubt in stating that intentional or knowing misappropriation of client funds is intolerable. Thus, we will not extend *Ince* to mean that where an attorney has misappropriated firm funds but not client funds, the presumption of disbarment must apply. In this case, Mr. Barrett did not misappropriate client funds. We therefore decline to extend *Ince's* ruling to hold that disbarment is the appropriate sanction whenever an attorney misappropriates firm funds....

391 P.3d at 1037-1038.

It went on to conclude:

> Although Mr. Barrett's misappropriation of firm funds is not deserving of the "professional death-sentence" of disbarment..., we hold that suspension is appropriate. Intentional or knowing misappropriation of firm funds is a serious offense, and we conclude that Mr. Barrett's intentional and knowing mental state, combined with the actual injury caused to his firm from losing the client funds that were due to it, along with the lack of compelling mitigating factors, merits a serious sanction. We therefore agree with the district court that the aggravating and mitigating factors do not justify deviating from suspension, and we uphold the court's order of a 150–day suspension.

Id. at 1038.

The court did have a difference of opinion with the district court, however, over the California lunch:

> [W]e reverse the district court's holding that Mr. Barrett violated rule 8.4(c) with regard to the California client lunch. The district court found that Mr. Barrett's reimbursement request was deceptive because it went against the firm's "informal understanding" that an attorney should personally attend client development lunches. But there is no evidence that SCM's policies prohibited Mr. Barrett from requesting reimbursement for a meal that he did not attend when he had spoken to the potential client on the phone. And in the absence of evidence that Mr. Barrett intentionally deceived the firm as to his presence at the lunch, we do not believe his conduct rises to the level that a sanction is necessary. We therefore find that Mr. Barrett did not violate rule 8.4(c) as to the third allegation.

Id. at 1038-1039.

3. Gambling, Converting Client Funds, and Mitigation

In re Miciotto
206 So. 3d 860 (La. 2016) (per curiam)

In December 2006, while a partner in the Hamauei and Miciotto firm, Attorney Joseph Miciotto made three withdrawals from his law firm's trust account, totaling $12,900, in order to obtain cash to gamble at a Shreveport casino. The conversion resulted in a $9300 overdraft in the trust account.

Thereafter,

> [i]n early January 2007, respondent consulted with a gambling addiction therapist, Dr. Kent Dean. On the advice of Dr. Dean and a local representative of the Judges and Lawyers Assistance Program ("JLAP"), respondent contacted JLAP and was referred to CORE, a gambling addiction program. Thereafter, respondent self-reported his misconduct to the ODC. By January 11, 2007, the converted funds were restored to the client trust account by Mr. Hamauei. The following day, Mr. Hamauei was reimbursed by respondent's father and respondent was admitted to the CORE program. Respondent was diagnosed with "Pathological Gambling D/O" and successfully completed the CORE program after thirty-six days of inpatient treatment.

206 So. 3d at 862.

The ODC filed charges in April, 2014, alleging that Miciotto's conduct had violated Rule 1.15, on safekeeping the property of clients or third persons.

When the case came before the Louisiana Supreme Court, it concluded that Miciotto had violated Rule 1.15 and turned to a determination of an appropriate sanction. It said that there was support in the record for some aggravating and mitigating factors found by the disciplinary board. According to the reported opinion, the disciplinary board had concluded that

> respondent knowingly and intentionally violated duties owed to his clients and to third-party medical providers. Nevertheless, the actual harm was minimal as the funds were quickly replaced in the trust account, and no client or third-party medical provider was harmed. After considering the ABA's Standards for Imposing Lawyer Sanctions, the board determined the applicable baseline sanction is suspension.
>
> In aggravation, the board found a dishonest or selfish motive and multiple offenses. In mitigation, the board found the absence of a prior disciplinary record, personal or emotional problems, full and free disclosure to the disciplinary board

and a cooperative attitude toward the proceedings, and remorse.

Id. at 863-864.

The Louisiana Supreme Court added:

> Additionally, the mitigating factor of timely good faith efforts to make restitution or to rectify the consequences of the misconduct is present. During his hearing testimony, respondent indicated he repaid his father for the funds his father gave Mr. Hamauei; therefore, even that harm has been rectified. The record also reflects respondent voluntarily left the practice of law between 2007 and 2014. The ODC was aware of respondent's intention to not practice law during this time and, arguably, chose to stay the disciplinary proceedings instead of moving them along in a timely manner. As soon as respondent informed the ODC he wanted to return to the practice of law working for Mr. Cooper, the ODC filed formal charges against him. As such, the delay in the disciplinary proceedings should also be taken into account as a mitigating factor. Finally, respondent indicated he has been active in Gamblers Anonymous since leaving the CORE program, and his wife indicated he usually attends a Gamblers Anonymous meeting once a week.

Id. at 864.

In light of the mitigating factors, the court adopted the recommendation of the disciplinary board and ordered suspension for a year and a day, fully deferred, subject to a two-year probationary period and the conditions that he maintain ongoing treatment for his gambling addiction for two years and that he work under the supervision of attorney J. Allen Cooper, Jr. for one year.

B. Supervision

In re Joiner
209 So. 3d 718 (La. 2015) (per curiam)

Larry and Jeri Lynn Carroll hired Charles Joiner to represent them in an automobile accident case. When the case settled, Joiner withheld funds to pay medical providers. But the medical providers were not paid. The Carrolls complained to the Office of Disciplinary Counsel (the "ODC"), which commenced an investigation. Eventually, Joiner's secretary, Lisa McBride confessed that she had been embezzling money from Joiner for several years. She told Joiner that she had deposited the Carroll's settlement funds into Joiner's operating account.

McBride did not know how much money she had embezzled, but she borrowed enough money from a relative to make restitution to Joiner in the amount of $39,312.35.

An ODC-directed audit

> revealed that, on February 22, 2008 (the date of the filing of the complaint

> against respondent), the balance in the account should have been at least $34,217.09. Instead, the actual balance in the trust account on this date was $188.61. Four of respondent's clients were impacted by the shortfall: Beatrice Reeves ($13,276.35), William and Johnnie Thomas ($9,133.75), Syble Evans ($9,870.14), and John Griggs ($1,936.85).

209 So. 3d at 722.

In November 2013, the ODC filed formal charges against Joiner, alleging that he had violated Rules 1.15 (safekeeping property of clients or third persons), 5.3(a)(b) (failure to properly supervise a non-lawyer assistant), and 8.4(a) (violation of the Rules of Professional Conduct).

When the case came before the Louisiana Supreme Court, it said:

> The hearing committee made a factual finding that respondent's negligent supervision of his non-lawyer assistant facilitated her embezzlement of client funds. Thus, the committee found respondent's actions violated Rule 5.3(b), which provides that a "lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer," as well as Rule 1.15, which requires the lawyer to safeguard client funds.
>
> This finding is supported by the record and is consistent with our jurisprudence. We have long recognized that a lawyer's duty to safeguard client funds includes the duty to supervise nonlawyer assistants who have access to client funds.

Id. at 724.

Analyzing the present case in light of its earlier decision in *Louisiana State Bar Association v. Keys*, 567 So. 2d 588 (La.1990), the court said:

> The reasoning of *Keys* is particularly appropriate under the facts of the case at bar. Although respondent may have been victimized by his assistant's improper actions, the ethical rules and jurisprudence of this court impose an overarching duty on the lawyer to safeguard the funds of the lawyer's clients. As in *Keys*, respondent's failure to supervise his assistant created a fertile environment for her embezzlement. Respondent's actions clearly constitute negligent violations of Rule 5.3 and Rule 1.15.

Id. The hearing committee had noted that Joiner had not personally reconciled his trust account for several years, had not personally reviewed trust account statements, and had left "all accounting of his trust account to Ms. McBride." *Id.* at 722.

The court also considered whether Joiner had made prompt restitution to his clients. It concluded that he had not:

> The record reveals respondent became aware of Ms. McBride's embezzlement in early 2008. On May 19, 2008, Ms. McBride paid respondent a total of $39,312.35 as restitution for her actions. This payment consisted of three checks: (1) a check made payable to respondent in the sum of $19,612.35, which was deposited into respondent's trust account; (2) a check made payable to respondent for $9,700, which was deposited into his operating account or regular account; and (3) a check made payable to respondent in the sum of $10,000, which was deposited into his personal account when he gave the check to his wife.
>
> Respondent suggests he acted reasonably in failing to deposit two of these checks into his trust account because, at the time, he did not believe that either a client or third party had not been paid. Nonetheless, the record reveals that at the time respondent deposited these checks, he had not yet performed a complete audit of his accounts for the purposes of determining whether any payments remained to be made to his clients or any third parties. In particular, respondent failed to provide his CPA with his operating account records for auditing purposes, despite learning from Ms. McBride that some client settlement funds were deposited into the account. Because of his failure to provide these records to his CPA, the audit done by his CPA failed to identify the $9,870.14 that should have been in the trust account from Ms. Evans' settlement. In a January 2009 sworn statement to the ODC, respondent indicated he did not provide those records to his CPA because he believed they would show Ms. McBride paid him too much in restitution, and he would owe her money. This statement suggests respondent placed his own interests above those of his clients.
>
> Subsequent audits indicated that as of 2008, respondent should have held funds in trust for four clients: (1) Ms. Reeves ($13,276.35); (2) Mr. Thomas ($9,133.75); (3) Ms. Evans ($9,870.14); and (4) Mr. Griggs ($1,936.85). Respondent ultimately did not make these clients whole until 2011 or 2012, approximately three or four years after he first received the funds from Ms. McBride.

Id. at 725.

The court concluded:

> Under these circumstances, we conclude respondent's negligent supervision of his nonlawyer assistant was coupled with a willful indifference toward his obligation to make prompt restitution to remedy the consequences of his negligence. We conclude such conduct warrants an actual period of suspension. Accordingly, we will suspend respondent from the practice of law for thirty days, followed by a one-year period of probation, during which he shall be required to attend the Louisiana State Bar Association's Trust Accounting School and undergo quarterly trust account audits under the conditions set forth in the disciplinary board's recommendation. We will further impose all costs of these proceedings against respondent.

Id. Justice Clark dissented. He disagreed with the conclusion that Joiner had shown a willful indifference toward his obligation to make prompt restitution. He said that the maximum discipline should have been a public reprimand with probation.

Cf., In re Dickens, 174 A.3d 283 (D.C. Ct. App. 2017) (Partner in small firm disbarred for stealing what was estimated to be at least $1,434,298.50 from several clients; the majority partner in the firm was also suspended for six months for, among other things, failing to adequately supervise the thieving partner; the court said that there were warning signs that something was amiss, and that the majority partner should have investigated and taken appropriate action)

C. Billing

In re Wallace
232 So. 3d 1216 (La. 2017) (per curiam)

Attorney Kenneth Wallace self-reported misconduct in recording false and inflated billable hours while employed at the Liskow & Lewis firm. Wallace became a shareholder at the firm in 2005, and had served as its hiring partner, head of recruiting, and as a member of the board of directors.

According to the reported opinion, the firm's compensation committee had noticed that Wallace's "fee bill credit", a measure of collections attributable to recorded billable time, seemed low. After doing some checking, it learned that, "between 2012 and 2015, respondent had recorded billing entries on a contingency fee case that had been dismissed in October 2012." 232 So. 3d at 1217. It found two other files with entries that had not been billed to clients. When the firm approached Wallace about what it had learned, he acknowledged and apologized for his misconduct. With his assistance and cooperation the firm did a more extensive investigation. According to the reported opinion,

> [i]n total, respondent submitted 428 entries that the firm classified as "certainly false" and an additional 220 entries that the firm classified as "reasonably certain" to be "false or inflated."

Id.

The opinion also states:

> Between 2012 and 2014, respondent received merit bonuses totaling $85,000. The firm concluded that respondent would most likely have received some or all of these merit bonuses even without the false inflation of his billable hours.

> Respondent indicated he engaged in this misconduct because he was concerned that his accurate billable hours, when coupled with an insufficient book of business, were not commensurate with his leadership position in the firm. He denied that he engaged in the misconduct out of a desire for discretionary bonuses or any other monetary gain.
>
> On November 22, 2015, respondent voluntarily submitted his letter of resignation to the firm, effective November 30, 2015. He also voluntarily renounced his entire termination bonus, which totaled approximately $85,000, owed to him for his share of the firm's accounts receivable. The firm determined that this renunciation likely exceeded any losses the firm incurred as a result of respondent's conduct.
>
> Respondent self-reported his misconduct to the ODC on November 25, 2015.

Id. The firm also reported its findings to the ODC.

The ODC filed formal charges, alleging that Wallace had violated Rules 8.4(a) (violation of the Rules of Professional Conduct) and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Wallace admitted his misconduct but said there were mitigating factors.

When the case reached the Louisiana Supreme Court, it said:

> The record supports a finding that respondent intentionally violated duties owed to the public and the legal profession. His actions had the potential to cause significant harm, however, there is no evidence that any client harm actually occurred. Likewise, it appears little or no actual harm was suffered by respondent's law firm. The record supports the aggravating and mitigating factors as stipulated to by the parties.
>
> Turning to the issue of an appropriate sanction, we find that respondent's conduct involved a long and repetitive pattern of dishonesty. As such, the lengthy thirty-month suspension sought by the ODC is clearly appropriate. However, there are significant mitigating circumstances present, including respondent's voluntary resignation from the firm and his renunciation of his entire termination bonus. These factors, coupled with the lack of harm to respondent's clients and the firm, justify the deferral of all but twelve months of the suspension.

Id. at 1220. So the sanction was a suspension for thirty months, all but twelve months deferred.

Cf., In re Leighton, 158 A.D.3d 23 (N.Y. Sup. Ct. 2017) (Public censure for attorney who submitted false entries totaling 94.8 hours into his firm's internal billing records; he did so in order to "deceive his colleagues and his firm about how busy he was").

D. Payment for Services

1. Bitcoin

Nebraska Ethics Advisory Opinion For Lawyers
No. 17-03

A Nebraska ethics committee considered some questions involving digital currencies.

> A. May an attorney receive digital currencies such as bitcoin as payment for legal services?
>
> B. May an attorney receive digital currencies from third parties as payment for the benefit of a client's account?
>
> C. May an attorney hold digital currencies in trust or escrow for clients?

With respect to the matter of receiving digital currencies in payment of services, the committee said, in a summary:

> An attorney may receive and accept digital currencies such as bitcoin as payment for legal services. In order to assure that the fee charged remains reasonable under Neb. Ct. R. Prof. Cond. § 3-501.5(a), which prohibits charging unreasonable fees [,] the attorney should mitigate the risk of volatility and possible unconscionable overpayment for services by (1) notifying the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment.

But the committee noted some cautions:

> However, Nebraska attorneys must be careful to see that this property they accept as payment is not contraband, does not reveal client secrets, and is not used in a money-laundering or tax avoidance scheme; because convertible virtual currencies can be associated with such mischief.

Regarding third-party payments, the committee summarized its views as follows:

> An attorney may receive digital currencies as payment from third-party payors so long as the payment prevents possible interference with the attorney's independent relationship with the client pursuant to Neb. Ct. R. of Prof. Cond. §3-501.7(a) or the client's confidential information pursuant to Neb. Ct. R. of Prof. Cond. §3-501.6 by implementing basic know-your-client ("KYC") procedures to identify any third-party payor prior to acceptance of payments made with digital currencies.

With respect to the "know-your-client" consideration, the committee observed that "the use of bitcoins is pseudonymous and often close to anonymous." So it was of the view that the attorney should take steps to identify the identity of the third-party payor.

On the question of holding digital currencies in escrow or trust, the committee summarized its view as follows:

> An attorney may hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to Neb. Ct. R. of Prof. Cond. §3-501.15(a) so long as the attorney holds the units of such currencies separate from the lawyer's property, kept with commercially reasonable safeguards and records are kept by the lawyer of the property so held for five (5) years after termination of the relationship. Because bitcoins are property rather than actual currency, bitcoins cannot be deposited into a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust Fund Requirements for Lawyers).

The volatility issue came up here as well: "Due to the volatility in the value of bitcoins and other digital currencies, the client and parties should be advised that the property held in trust or escrow will be held and not converted into U.S. dollars or other currency." The committee also mentioned security concerns:

> Due to security concerns, an attorney opting to receive client payments in Bitcoin or storing them on behalf of clients, whether in trust or in escrow, must take reasonable security precautions. There is no bank or FDIC insurance to reimburse a Bitcoin holder if a hacker steals them. Once lost, bitcoins could be gone forever. Reasonable methods could include encryption of the private key required to send the bitcoins. Another method may include utilization of more than one private key (known as a "multisignature account" or "multi-sig") for access to the bitcoins. Other reasonable measures may include maintenance of the wallet in a computer or other storage device that is disconnected from the Internet (also known as "cold storage"), a method that would also allow for off-line storage of one or more private keys.

And further on the question of depositing digital currency in a trust account, the committee said:

> However, unless converted to U.S. dollars, bitcoins cannot be deposited in a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust

Fund Requirements for Lawyers). Thus, if a lawyer receives bitcoins intended to reflect a retainer to be drawn upon when fees are earned in the future, the lawyer must immediately convert the bitcoins into U.S. dollars in accord with section V(A) of this opinion.

2. Barter

New Hampshire Bar Association Ethics Committee
Ethics Committee Advisory Opinion #2017-18/01

The New Hampshire ethics committee considered

> [w]hether a lawyer who agrees at the outset of representation to receive compensation for legal services in kind, rather than in cash, must advise the client of the desirability of seeking the advice of independent legal counsel, and whether compliance with Rule 1.8 prevents the transaction from being voidable.

The committee was of the view that "[b]arter agreements are business transactions between a lawyer providing legal services and a client providing goods or services." So they are subject to Rule 1.8 of the New Hampshire Rules of Professional Conduct. It provides:

> a. *A lawyer shall not enter into a business transaction with a client* or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client *unless*:
> 1. *the transaction and terms* on which the lawyer acquires the interest are fair and reasonable to the client and *are fully disclosed and transmitted in writing* in a manner that can be reasonably understood by the client;
> 2. *the client is advised in writing of the desirability of seeking* and is given a reasonable opportunity to seek *the advice of independent legal counsel* on the transaction; and
> 3. *the client gives informed consent, in a writing signed by the client*, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Emphasis in opinion.

The committee noted that, as per a comment to the ABA version of the rule, it is not applicable to standard fee agreements or "standard commercial *transactions* between the lawyer and the client for products or services that the client generally markets to others."

It also referenced the *Restatement (Third) of the Law Governing Lawyers* § 126(a) (2000) for the proposition that "[a] lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction *in which the lawyer does not render legal*

services." (emphasis in opinion). The committee thought that this exception did not apply to bartering for legal services.

The committee concluded:

> The lawyer will need to comply with all the provisions of NHRPC Rule 1.8(a), including the requirement to advise the client in writing of the desirability of seeking the advice of independent legal counsel, in any agreement to exchange goods or services for legal fees entered into at the outset of legal representation or during the course of such representation. Even if the lawyer strictly complies with Rule 1.8(a), however, the courts may view the transaction as voidable if the client later feels aggrieved by the transaction.

3. Meeting of the Minds

O'Malley, Miles, Nylen & Gilmore, P.A. v. Burley
2017 WL 1709925 (Md. Ct. Spec. App. 2017)

The O'Malley firm sued its former client, Maria Burley, for unpaid legal fees. Burley had retained Isaac Marks and the O'Malley firm in 2002 to represent her in the administration of an estate, including the sale of a piece of land. In the first year of the representation, the firm send Burley monthly billing statements, but she was unable to pay them. The firm claims that, in response, it proposed a modification of the billing arrangements. It would continue to provide legal services, but it would not issue new billing statements, and payment would be deferred until the land was sold. The firm had no documentation of this understanding.

The firm continued to provide services to Burley from 2003 until 2012. It did not send her a bill. In 2012, Marks left the firm, and Burley told the firm that she wanted to continue with Marks' representation. In October of that year, the land was sold. The firm sent a letter to Burley seeking payment for its years of work. It claimed that she owed the firm $274,850.64. Burley did not pay.

The matter went to trial. The court ruled in Burley's favor.

On appeal, one of the issues was whether equitable estoppel prevented Burley from raising a statute of limitations defense, on the theory that she knew that the firm was providing legal services but she did not question why she had received no bills. The trial court had found, on this issue, that because the firm had failed to keep Burley informed about what it was doing and about how large the bill had become, the firm's reliance on her conduct was unreasonable. It also found the firm's conduct to be unreasonable.

The appellate court affirmed. It an "unreported" opinion, the court stated, in part:

> [The firm] complains that the court did not focus on whether the firm reasonably

> relied on Ms. Burley's conduct (or more precisely, her inaction), but on whether it was unreasonable for the firm not to obtain a signed document memorializing the alleged agreement. We do not think that this is a fair reading of the court's extemporaneous, oral ruling. In explaining why it would be inequitable to estop Ms. Burley from employing the defense of limitations, the court mentioned the firm's failure to keep the client informed, as well as the failure to memorialize the alleged agreement. By contrast, in explaining why it found the firm's conduct to be unreasonable, the court dwelled, at some length, on the attorney-client relationship, an attorney's obligation to keep the client informed, and the unreasonableness of a firm claiming an entitlement to hundreds of thousands of dollars in attorneys' fees without giving the client the information necessary to evaluate and object to the reasonableness of the work performed or the fees charged. In short, although the firm's failure to obtain a signed agreement appears to have had a bearing on the court's assessment about whether to exercise its discretion to afford equitable relief, the failure to obtain a signed agreement was not the basis for the court's conclusion that the firm had acted unreasonably.

E. Inadvertent Receipt of Confidential Information

1. Email

McDermott, Will & Emery LLP v. Superior Court
217 Cal. Rptr. 3d 47 (Cal. Ct. App. 2017)

The Gibson Dunn firm was disqualified from representing the McDermott, Will firm in a legal malpractice case because of its use of an inadvertently disclosed email communication.

One of the plaintiffs in the legal malpractice case, Dick Hausman, had received an email message from Mark Blaskey, a lawyer whom Hausman had hired to give him advice about an underlying family dispute that ended up in litigation. The email message, which was lengthy, summarized a meeting about the family dispute and provided advice to Hausman about his options for resolving it. Hausman apparently inadvertently sent the message to another relative (Ninetta) via his cell phone. Hausman was “nearly 80 years old when he forwarded the e-mail and he explained multiple sclerosis had limited his physical dexterity.” 217 Cal Rptr. at 58. The message thereafter received broader circulation, became part of a document production, and was used by a Gibson Dunn lawyer in a deposition in the underlying family dispute. It was also used by Gibson Dunn in a deposition in the related legal malpractice action.

Hausman filed a motion in the malpractice action seeking disqualification of Gibson Dunn. The trial court granted the motion. An appeal followed.

A threshold issue was whether there had been a waiver of the attorney-client privilege. On this point, the appellate court said, in part:

> Defendants do not dispute the Blaskey e-mail was a privileged attorney-client

> communication, but contend the trial court erred "as a matter of law" in determining [Hausman] did not waive the privilege....
>
> The trial court concluded [Hausman] did not waive the attorney-client privilege because "[t]here is no basis to find intentional waiver." ....
>
> Nothing in the trial court's ruling suggests the court failed to consider all the evidence in reaching its decision, and Defendants do not cite anything in the record to support their contrary contention.

Id. at 64-65.

The court considered whether Ninetta's further circulation of the email message resulted in waiver of the privilege, but the appellate court rejected the argument, because she was not a holder of the privilege, because there was substantial evidence that Hausman did not consent to the disclosures, and because he did not learn of them until a year after they had occurred.

The appellate court next considered the obligation of the lawyer who receives inadvertently sent confidential information. Quoting from an earlier case, *State Compensation Insurance Fund. V. WPS, Inc*., 83 Cal. Rptr. 799 (Cal. Ct. App. 1999), the court said:

> When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.

217 Cal. Rptr. at 68.

The court concluded that these obligations applied here, and that the obligations were not limited to a situation in which the inadvertence is by opposing counsel in litigation. In this regard, the court referred to a California Supreme Court case, *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Ca. 2007):

> In *Rico*, the Supreme Court applied the *State Fund* rule to attorney work product notes that a plaintiff's attorney acquired during litigation, but were not produced either by the defense attorney who created the notes or by the defendant he represented. The plaintiff's attorney argued a court reporter mistakenly gave him

> the notes during a deposition, but defense counsel argued the plaintiff's attorney stole the notes from his file during the same deposition.... The Supreme Court concluded the *State Fund* rule applied by simply examining whether the notes were clearly privileged and whether it was reasonably apparent their disclosure was inadvertent. Whether the plaintiff's attorney wrongfully took the notes, or the court reporter mistakenly gave them to the plaintiff's attorney, did not influence the court's analysis because the record showed the defendant's attorney did not intend to disclose the notes, and therefore the disclosure was inadvertent under either scenario.

217 Cal. Rptr. at 71.

The court concluded that there was substantial evidence supporting the trial court's remedy of disqualification:

> The record shows Gibson Dunn received the Blaskey e-mail from its client and fully reviewed the communication before producing it in response to [Hausman's] subpoena in the Probate Action. At Lurie's deposition in the Probate Action, Rick's counsel questioned Lurie about the circumstances surrounding the e-mail, prompting [Hausman's] counsel to immediately object the e-mail was an inadvertently disclosed attorney-client communication and demand that Gibson Dunn return its copies as required by *State Fund*. Gibson Dunn refused to return the Blaskey e-mail, denying that it was privileged and that the *State Fund* rule applied. Gibson Dunn then further reviewed and analyzed the e-mail to determine its relevance to the claims and defenses in the Malpractice Actions, formulated deposition questions based on the e-mail's content, and deposed May Jo and Teri about the e-mail while reading portions of it into the record. Gibson Dunn also identified and quoted the e-mail in its interrogatory responses that described evidence supporting Defendants' defenses, produced the e-mail in discovery, and lodged a copy with the trial court in opposition to the privilege motion.
>
> This constitutes substantial evidence supporting the trial court's finding disqualification was necessary to prevent future prejudice or harm to [Hausman] from Gibson Dunn's exploitation of the e-mail's contents. Indeed, this evidence shows Gibson Dunn thought it could use the e-mail to Defendants' advantage in opposing [Hausman's] claims.

One judge dissented, in part on the theory that the *State Fund* rule did not apply:

> In *State Fund*, the plaintiff's lawyer erroneously sent the privileged documents directly to the defendant's lawyers, together with copies of other documents previously produced during discovery, all in preparation for trial....
>
> The erroneous disclosure was patently inadvertent and undisputed. *(State Fund*, *supra*, 70 Cal.App.4th at p. 648, 82 Cal.Rptr.2d 799.) When the defendant's

lawyer refused to return the privileged documents, the plaintiff's lawyer promptly sought an order compelling destruction or return of the privileged documents and sanctions. (*Id*. at p. 649, 82 Cal.Rptr.2d 799.)

In this case, a client, [Hausman], forwarded the Blaskey e-mail to a nonlawyer, Ninetta, who forwarded it to Gavin, another nonlawyer. Gavin then gave hard copies to Rick, Cox and Pellizzon, all nonlawyers. Gavin also forwarded it to Lurie, who was a lawyer for MHI at that time but is now a client. Lurie put it in the MWE/MHI client file, where it was later found by his lawyers, Gibson Dunn.

The only disclosure in this entire series of disclosures which was even arguably inadvertent was the initial disclosure by [Hausman] to Ninetta. That disclosure was not patently inadvertent, and the claimed inadvertence was subject to reasonable dispute. Furthermore, none of these disclosures occurred in the context of formal discovery or preparation for trial. Instead, they all occurred in the context of an attempt to resolve the MHI dispute without litigation, with Gavin acting as an informal mediator.

...

... The *State Fund* rule prevents " 'a "gotcha" theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent [to waive the privilege].' " ... But extending the *State Fund* rule to the unusual situation here results in a reverse gotcha which could "nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in any attorney's mailbox." ... "Protecting the integrity of judicial proceedings does not require so draconian a rule."

217 Cal. Rptr. at 85-87.

2. Inadvertent Inclusion in Expert Report

Lloyds of London Syndicate 2003 v. Fireman's Fund Insurance Co.
320 F.R.D. 557 (D. Kan. 2017)

Before his deposition, Jack Murphy, defendant's retained expert in a lawsuit between two insurance companies, produced his written report. He also inadvertently included an email message that defendant considered to be attorney work product. During the deposition, defense counsel realized what had happened, notified plaintiff's counsel of the inadvertent disclosure, and demanded return of the email. Plaintiff's counsel refused, claiming that defense counsel had waived work product protection by disclosing the email in the written report.

The court concluded that the email was work product:

> Here, defendant asserts in its Reply that "the email concerned correction of typographical errors in the expert's draft report and requesting that Mr. Murphy expand his discussion on two of the topics in his report." … The email thus describes defense counsel's impressions of the expert's report, and it directs the expert to make certain changes to the report's substance. So … the email contains defense counsel's mental impressions, conclusions, opinions, or legal theories. Defense counsel also made the statements when anticipating litigation. Indeed, the parties already were litigating this lawsuit when defense counsel sent the email. The court thus finds that the email satisfies the work product requirements as codified in Rule 26(b)(3).

320 F.R.D. at 561.

The main issue was whether the inadvertent disclosure waived work product protection. On this point, the court turned first to Federal Rules of Evidence 502, stating:

> Federal Rule of Evidence 502 codifies a standard for determining if inadvertent disclosures waive work product protections. Fed. R. Evid. 502(b). Enacted in 2008, Rule 502 primarily adopts the majority view that an inadvertent disclosure of protected communications does not constitute a waiver if the producing party took reasonable actions to avoid the disclosure.

Id. at 562-563.

However, the court noted that, even after the adoption of Rule 502, it has continued to apply a **"**common law five-factor test for inadvertent disclosures that requires the court to consider the reasonableness of precautions taken to prevent inadvertent disclosure and the time taken to rectify the error." *Id.* at 563. The court said that the "five-factor test analyzes: (1) the reasonableness of the precautions which the party took to prevent inadvertent disclosure; (2) the time which the party took to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness." *Id.* at 564.

The court considered whether defendant had taken reasonable precautions to prevent inadvertent disclosure. Defense counsel had written "'Attorney work product protected from disclosure by FRCP 26(b)(4)(B) & (C)' at the top of the email." *Id.* On the other hand, defense counsel had not reviewed the report again before it had gone to the plaintiffs, and had relied on the expert to cull out protected documents. However, the report was extensive. It had some 1500 pages of material. Under these circumstances, the court concluded that "this first factor slightly weighs against waiver." *Id.*

With respect to the three middle factors, the court concluded that defense counsel had taken prompt action to rectify the error, that the "single inadvertent disclosure" was minor with respect to the scope of discovery, and that the inadvertent production to opposing counsel was not extensive. Id. at 565.

On the final factor, the court said:"[k]ey to the court's determination of the fifth factor is the relevancy of the disclosed documents." *Id.* It went on:

> Here, the email suggested corrections to typographical errors in Mr. Murphy's draft report and asked that he expand his discussion on two topics. Nothing suggests that the email contained relevant information that could affect the claims asserted or add any new theories. The court also finds that plaintiff will sustain no prejudice if the court refuses to find a waiver and orders plaintiff to return the email. Losing access to an inadvertently produced document, and thus any tactical advantage that the document may provide, does not amount to prejudice sufficient to find a waiver. Indeed, our court has recognized that no compelling reason exists "to rigidly apply a waiver of work product" over a few inadvertently-produced documents from a pool of thousands when the non-disclosing party's "arguments...reduce themselves to little more than a claim that they should not be deprived of a tactical advantage fortuitously gained by a party's inadvertence." … The court applies this reasoning equally to the facts here. The final factor—fairness—thus weighs against waiver.

Id.

3. Metadata

The Professional Ethics Committee for the State Bar of Texas
Opinion 665 (2016)

The Texas ethics committee was asked a couple of questions about metadata. The scenario was described as follows:

> Lawyer A represents a client in the settlement of a civil lawsuit. Lawyer A sends a draft settlement agreement to opposing counsel, Lawyer B, as an attachment to an email. The attachment includes embedded data, commonly called metadata. This metadata is digital data that is not immediately visible when the document is opened by the recipient of the email but can be read either through the use of certain commands available in word-processing software or through the use of specialized software. In this case, the metadata includes information revealing confidential information of the client of Lawyer A related to ongoing settlement negotiations. Lawyer B has no reason to believe that Lawyer A intended to include this metadata in the attachment.

The first question was about the duty a lawyer has to avoid the inadvertent transmission of metadata containing confidential information. On this point, the committee said, among other things:

> In the opinion of the Committee, a lawyer's duty of competence requires that lawyers who use electronic documents understand that metadata is created in the generation of electronic documents, that transmission of electronic documents will include transmission of metadata, that the transmitted metadata may include confidential information, that recipients of the documents can access metadata, and that actions can be taken to prevent or minimize the transmission of metadata. Lawyers therefore have a duty to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons to whom such confidential information is not to be revealed .... Commonly employed methods for avoiding the disclosure of confidential information in metadata include the use of software to remove or "scrub" metadata from the document before transmission, the conversion of the document into another format that does not preserve the original metadata, and transmission of the document by fax or hard copy.

Opinion at 2.

The second question related to the duties of the lawyer who receives the electronic document containing metadata that appears to include confidential information. On this question, the committee said:

> There is no specific provision in the Texas Disciplinary Rules requiring a lawyer to take or refrain from taking any particular action in such a situation. *See* Professional Ethics Committee Opinion 664 (October 2016) ("The Texas Disciplinary Rules of Professional Conduct do not prescribe a specific course of conduct a lawyer must follow upon the unauthorized or inadvertent receipt of another party's confidential information outside the normal course of discovery.").

Opinion at 3.

So the committee concluded that the Texas rules do not prohibit a lawyer from "searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received." *Id.* But the committee said that the receiving lawyer must not engage in false or misleading communications, in light of what the lawyer now knows as a result of the metadata.

The committee observed, however, that some jurisdictions would deal with the second question differently. It noted that a number of them have adopted ABA Model Rule 4.4(b), which provides:

> A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

The committee also noted that there was a risk – even in Texas – that the receiving lawyer could be subject to disqualification based on receipt of an opponent's confidential information outside of discovery.

F. Files

Nebraska Ethics Advisory Opinion for Lawyers
No. 17-01

Responding to an inquiry by a legal services organization, a Nebraska ethics committee looked at whether ethics rules prohibit lawyers from storing a closed client file in electronic form and destroying the physical file. The committee said no. It said: "Given the impact of technology on how files can be retained, it is not reasonable or practical keep physical/paper copies of every client file." So, according to the committee, it is reasonable to "digitize" the closed files.

But there are some things that the committee thought that lawyers ought to consider. It referred to an earlier opinion on file retention for the following:

> 1. The file may include original documents or other property furnished by or on behalf of the client, the return of which might reasonably be expected by the client. Before destroying such documents or property, the client should be asked whether he wants delivery of them. Alternatively, the lawyer may simply deliver such documents to the client with appropriate advice regarding factors which the client should consider in determining which items to preserve. Where unable to contact the client, the lawyer should be guided by the foreseeable need for the documents in determining whether to destroy them.
>
> 2. An attorney must use care not to destroy or discard information that he knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which a statute of limitations has not expired.
>
> 3. An attorney must consider the reasonable expectations of the client for the preservation of files.
>
> 4. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their relevance and materiality to matters that can be expected to arise in the future.
>
> 5. Disposition of client files must be made in such a manner as to protect full the confidentiality of the contents.

The committee mentioned other considerations as well, and it referred more broadly to "any other considerations that are pertinent to the contents of a particular file." It gave an example of

> unique circumstances where maintaining a paper copy of a client file would outweigh the convenience of an electronically stored copy (e.g. large items such as architectural/engineering plans, large photos, items that might be costly to reproduce from digital to paper).

The committee also said that any such file destruction and electronic retention should be undertaken in accordance with a written procedure.

Cf., New York State Bar Association Committee on Professional Ethics, Opinion 1142 (Where a lawyer keeps client files in electronic form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form

in which the client can access them. The client may not be able to access electronic files when the client is incarcerated. The lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy).

G. Sexually-Related Misconduct

1. Response to Allegation of Sexual Harassment

In re Bonilla
60 N.Y.S. 3d 405 (App. Div. 2017)

While serving as a town clerk, attorney Mark Bonilla sought to obtain incriminating evidence against a female employee who had accused him of sexual harassment.

> Specifically, upon learning that a male employee possessed compromising photographs of the female employee, the respondent tried to obtain the photographs by threatening to have the male employee transferred from his position in the respondent's office if he did not provide the photographs. Shortly after making this threat, and without having received the photographs, the respondent retracted his 'request' for the photographs and apologized to the male employee.

60 N.Y.S. 3d at 407. Bonilla was charged with coercion in the second degree and attempted petit larceny, in violation of applicable provisions of New York Penal Law. He was found guilty, sentenced to "a one-year conditional discharge" and fined. He was also removed from office.

Bonilla was also subject to lawyer disciplinary proceedings, for illegal conduct that adversely reflected on his honesty, trustworthiness or fitness as a lawyer and for conduct that adversely reflected on his fitness as a lawyer. He admitted the factual allegations but said that there were mitigating factors:

> [H]is conduct was not malicious, the threats were not physical, and allegedly were not of a financial nature; his cooperation at his criminal trial; the public humiliation he has endured as well as the loss of his entire life's savings defending the case and sustaining his family; the 300 hours of community service he has completed; his remorse; the 121 character letters he submitted to the sentencing court, which demonstrate that the misconduct was an isolated act; and his unblemished record in 20 years of practice

Id. at 408.

The court was not disposed to impose a light sanction:

> Notwithstanding the mitigation advanced, the respondent has been convicted of a serious crime committed in his capacity as a public official. While serving as Hempstead Town Clerk, the respondent threatened to have an employee transferred from his position in the respondent's office if he did not provide the respondent with incriminating photographs, conduct clearly abusive of his position. The respondent's actions were committed knowingly and with venal

> purpose in an effort to defend himself against the claim of a female employee who had accused him of sexual harassment.
>
> Under the totality of the circumstances, we conclude that a suspension of two years is warranted, with credit for the time elapsed under the immediate suspension imposed by this Court's order.

Id.

2. Sexting

State of Oklahoma v. Hixson
397 P.3d 483 (Okla. 2017)

Attorney Mark Hixson was in private practice in Oklahoma, primarily representing criminal defendants. A client, identified as "S.R." hired Hixson to represent her on charges of possessing drug paraphernalia. S.R. was an unemployed 25-year old single person who had a newborn infant.

During the course of the representation, Hixson sent S.R. several inappropriate text messages. According to the opinion in the case, Hixson

> offered to take S.R. on a shopping spree to Victoria's Secret and he made crude suggestions. He admitted that he had "always had a thing for [S.R.]" and he had "liked [her] for years!" Respondent continued making inappropriate sexual advances via text message toward his client and requesting she text him photographs of her body and give him a "preview." S.R. sent some photos of her unclothed body via text. Respondent said he liked what he was seeing, but he "would like to get the real thing!" Within 5 days of his initial text suggesting "lunch," he solicited S.R., offering her $100 for the "real thing." S.R. let him know that "[r]egardless of you think [sic.], I haven't ever done that before." Respondent continued sending sexual text messages to S.R. About one month later, he solicited sex from his client, asking how much she would charge for "straight sex" and what else she would be willing to do and the cost. His client never initiated the sexual text dialogue and never solicited Respondent. His actions were solely driven by Respondent's private motivations.
>
> Respondent continued to text his client over a span of seven weeks making repeated requests for a sexual relationship with S.R. and sought pictures of her undressed body.

397 P.3d at 486 (Footnotes omitted).

Hixson was criminally charged with soliciting prostitution. Disciplinary proceedings were also initiated. Oklahoma Rule 8.4 provides that "[i]t is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

The Oklahoma Supreme Court said:

> It is deeply disturbing to this Court that Respondent attempts to shift any

> responsibility to his client, the victim of his calculated and premeditated crimes and professional misconduct. Respondent expressed that he had a long-standing attraction and desire for S.R., that spanned "years." The eighty-three (83) pages of text messages between Respondent and S.R. paint an unmistakable picture. Respondent initiated this sexual dialogue and he alone pursued a sexual relationship, it was not consensual. Moreover, at the moment S.R. is at her most vulnerable, Respondent urges her again for a sexual relationship offering she could do "favors" for a fee. The pursuit of a sexual relationship was independently driven by Respondent.

Id. at 487. The court concluded that Hixson's conduct gave rise to a conflict of interest. In this connection, it said that his actions were "for the sole purpose of gratifying his sexual desire and to exploit his client." His "sexually exploitive behavior to his client, violated both Rule 1.7 of the ORPC and his professional duty as an attorney to protect his client's interests."

It also concluded that the crime of solicitation of prostitution was also a violation of professional norms:

> Respondent's case is not just simply a discipline issue that deals with the criminal aspect of soliciting prostitution; the solicitation was to his client, the one to whom Respondent owed the highest of fiduciary duties. Not only was his act of solicitation a crime, but he was inducing his own client to commit a crime. Such behavior by an attorney is a "flagrant disregard of the best interests of the client for [the attorney's] own needs." ... Respondent's conduct adversely reflected on his fitness as a lawyer and constituted professional misconduct under Rule 8.4.

Id. at 489.

The disciplinary report had recommended that Hixson be suspended for a year, but the court opted for a lesser sanction. It said:

> Respondent never engaged in physical contact with S.R. All of his unprofessional and criminal conduct was limited to his dialogue expressed by text message. Respondent has devoted much of his adult life volunteering in his local and professional community through service organizations and the OBA. [Oklahoma Bar Association] He has held volunteer positions appointed by the governor as well as leadership roles within the OBA. Respondent expressed profound remorse regarding the effect his actions has had on the profession, his family and community. One witness indicated that this matter has changed Respondent. This Court favorably notes that Respondent admitted to his actions and was fully cooperative with the OBA, law enforcement and voluntarily resigned all of his esteemed volunteer positions.

Id. at 490.

The court ordered a six-month suspension, with credit for time served from the date of an interim suspension, and it issued a public censure. Four justices dissented. One did not express a reason. Three justices said that they would have imposed a two-year suspension, with credit for time served on the interim suspension.

3. Children

In re Legato
161 A.3d 111 (N.J. 2017)

This is a consolidated disciplinary case, involving inappropriate sexual conduct by New Jersey lawyers Mark Legato, Regan Kenyon, and Alexander Walter. The intended victims were children.

Legato

> engaged in explicit online conversations with a person he believed to be a twelve-year-old girl. During the conversations, Legato asked the girl to touch her genitals and told her that he would like to engage in oral sex and intercourse with her. Legato then began a video chat with her, during which he unzipped his pants and exposed his erect penis. He also admitted to scheduling two in-person meetings with the girl, but did not appear at either. Unbeknownst to Legato, the girl was actually an undercover law enforcement officer. Those interactions led to his arrest and subsequent guilty plea.

161 A.3d at 115.

Kenyon

> engaged in online conversations with a person he believed to be a fourteen-year-old girl. He sent her images of, and links to, hardcore adult pornography and arranged to meet the girl, but did not appear for the meeting. Kenyon was unaware that he was in fact communicating with an undercover law enforcement officer. He was arrested and pled guilty to one count of attempted endangering the welfare of a child.

Id. at 180.

Walter

> masturbated in the presence of a nine-year-old girl, who moved into his home with her mother. He admitted that he masturbated in front of the girl for his own sexual pleasure while the two were alone in the family swimming pool. Walter was arrested and pled guilty to one count of endangering the welfare of a child.

Id. at 181.

Lawyer disciplinary proceedings were invoked against each lawyer, and their cases were consolidated before the New Jersey Supreme Court. The court discussed its general approach to such cases as follows:

> We have refrained from establishing a bright-line rule requiring disbarment in all cases involving sexual offenses against children.... Rather, we found that the appropriate level of discipline may depend on different factors, such as whether the case "involved touching, physical violence, or actual dissemination [of child pornography] to others, the number of pictures or videos, or whether the

> perpetrator suffered from mental illness or sexual abuse himself or herself." ... Thus, the imposition of discipline in cases involving sexual misconduct with a minor requires a fact-sensitive inquiry on a case-by-case basis.

Id. at 182-183.

The court then went on to a case-by-case analysis of the conduct of the three lawyers, in which the court compared their conduct to earlier disciplinary cases.

Regarding Legato, the court said that

> we find that indeterminate suspension is appropriate for Legato because he admitted to targeting an underage child online, but never took the additional step of meeting with the minor. Instead, the communication with the purported minor was limited to online interaction.

Id. at 186.

In the case of Kenyon, the court said: "Similarly, Kenyon's conduct merits indeterminate suspension. Like Legato, Kenyon engaged in illicit online conversations with an individual he believed to be a minor, but he never met the child in person. Kenyon's psychiatric evaluation was also favorable." *Id.*

Walter faced more severe discipline. Regarding his conduct, the court said:

> On multiple occasions throughout a five-month period, Walter masturbated in the family pool in front of a nine-year-old girl who was under his care. Strikingly, in describing the course of events to his evaluating psychologist, Walter implied that while in the pool the "physical barriers broke down, and the two became too comfortable with each other physically." We agree with the DRB's assessment that this characterization demonstrates that Walter does not appear to take full responsibility for his actions, attempting to apportion blame to a nine-year-old child.
>
> We further reject Walter's argument that his conduct is less culpable than that in *Frye*, simply because he did not actually fondle the child but instead masturbated in her presence for his own sexual gratification. Unlike Legato and Kenyon, Walter was not shielded by distance or the artificiality of online interaction. When "physical barriers broke down," Walter was not living an online fantasy—he was masturbating in his pool in the presence of a young child in his charge.
>
> We find that the nature and severity of his conduct, the physical presence of the child, and his position of power over and responsibility for the child brings Walter's actions into the realm of *Frye* and *Wright*. Walter has demonstrated that he is willing to take advantage of his power for his own benefit, encapsulating the precise object that we are tasked with maintaining—public confidence in the bar. The lack of apparent remorse, lack of acceptance of responsibility and multiple instances of masturbating in the presence of a child who was under his care clearly warrant Walter's disbarment.

Id. at 188-189.

One Justice filed a dissent. Quoting from an earlier case, he said that "[s]ome 'ethical violations are, by their very nature, so patently offensive to the elementary standards of a lawyer's professional duty that they per se warrant disbarment.'" He would have disbarred Legato and Kenyon as well.

H. Conflicts of Interest

1. Media Rights

In re Henderson
78 N.E.3d 1092 (Ind. 2017)

Keith Henderson was the prosecutor in the second trial of David Camm, a former police officer who had been charged with murdering his wife and two minor children. Camm was twice convicted, but his convictions were reversed on appeal. Henderson was also involved in the third prosecution of Camm (which ended in acquittal), until he was removed because of a conflict of interest.

After the jury returned a guilty verdict in the second trial, Henderson entered into an agreement with a literary agent, with the idea of writing and publishing a book about the Camm case. Henderson continued to represent the state in post-trial proceedings. While the Camm case was pending before the Indiana Supreme Court, Henderson entered into a publication agreement with a publisher. According to the Indiana Supreme Court's decision in the eventual disciplinary case:

> After we issued our decision reversing Camm's convictions and remanding for a third trial, Respondent wrote to Literary Agent, expressing his belief that "this is now a bigger story" and asking Literary Agent to seek a "pushed back time frame" for publication and "to push for something more out of the contract." However, Publisher instead elected to terminate the book contract.

78. N.E.3d at 1093.

Camm's lawyer filed a disciplinary complaint against Henderson. The Disciplinary Commission filed a complaint, with two counts,[1] the first of which was described as follows:

> Count 1 of the Commission's verified complaint, as amended over Respondent's objection, charged Respondent with violations of Indiana Professional Conduct Rules 1.7(a)(2), 1.8(d), and 8.4(d), premised on Respondent's conflict between his duties to the State and his own personal interests and the impact that conflict had upon the criminal proceedings against Camm.

Id.

Indiana Rule 1.7 is the basic conflict of interest rule. Rule 8.4(d) is the rule prohibiting conduct

[1] The second count, dealing with an expense reimbursement matter, was ultimately rejected by the Indiana Supreme Court.

that is “prejudicial to the administration justice.” Rule 1.8(d) provides: “Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”

The hearing officer found Respondent's conduct violated all three rules, writing that “[o]nce [Respondent] compromised his independent judgment by securing his personal interests, he irreversibly and materially limited his own ability to represent the State in the prosecution of Camm.” (HO's Report at 9). *Id.*

The book deals were the central problem. The Indiana Supreme Court agreed with the conclusions of the hearing officer. It issued a public reprimand.

2. Playbook Conflict

Watkins v. Trans Union, LLC
869 F.3d 514 (7th Cir. 2017)

This case concerns what is sometimes referred to as a “playbook” conflict. One that arises when a lawyer is involved in litigation against a former corporate client. The former client might argue that the lawyer has some inside information that he or she can use against the former client. And that the lawyer should therefore be disqualified from the litigation.

Richard Watkins sued Trans Union for violating the Fair Credit Reporting Act. He claimed that Trans Union’s algorithms had merged or mixed his credit file with that of another person. He contended that the result was the inclusion of collection matters that did not relate to him.

Trans Union sought to disqualify Watkins’ attorney, John Cento. Cento had represented Trans Union in the past. He had begun representing it in 2001, while working with attorney Robert Schuckit. Between 2003 and 2005, he had “worked almost exclusively on Trans Union cases.” 869 F.3d at 516.

According to the reported opinion:

> Almost all of the cases in which Cento represented Trans Union involved the Fair Credit Reporting Act (FCRA). The FCRA imposes a duty to maintain reasonable procedures for accurate reporting…. The Act authorizes a private cause of action for consumers against consumer reporting agencies such as Trans Union for willful, knowing, or negligent failures to comply with the law…. A defendant may avoid liability for violations that occur despite the defendant's good-faith effort to comply with the law…
>
> Cento defended Trans Union against those claims of FCRA violations for five years. Between 2001 and 2005, he represented Trans Union in over 250 cases and billed over 4,000 hours of work for Trans Union. He worked with Trans Union's in-house counsel and employees, and he was given access to any information necessary for litigation. Today, twelve years after Cento last represented Trans Union, Schuckit and his firm continue to represent Trans Union. Some of the Trans Union employees with whom Cento worked remain with the company.

Id. at 516-517. Cento formed Cento Law in 2013. It represents consumers bringing FCRA claims against credit reporting agencies.

The federal district court concluded that Cento should not be disqualified. The matter came before the 7th Circuit Court of Appeals. Because the lawsuit had arisen in the Southern District of Indiana, the court turned to the language of Rule 1.9 of the Indiana Rule of Professional Conduct. It states:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The court also referred to a comment to the rule, stating:

> If the prior and present matters do not involve the same transaction or legal dispute, they may still be substantially related if there is a substantial risk that confidential information would materially advance the client's position in the present matter. The commentary tells us that information "disclosed to the public or to other parties adverse to the former client ordinary will not be disqualifying," and that information "acquired in a prior representation may have been rendered obsolete by the passage of time."
>
> On the issue most pertinent to this case, the commentary explains that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." … "In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation." ….

869 F.3d at 520 (citations omitted).

The court went on:

> The district court looked to the language of Rule 1.9 and its commentary and determined that the dispute between Watkins and Trans Union neither involved the "same transaction or legal dispute" as those prior cases in which Cento represented Trans Union nor involved a "substantial risk" of confidential information Cento may have gained while working for Trans Union materially advancing Watkins' claim.… We agree.

Id. at 520-521. The court said that "Watkins' complaint does not refer to any specific prior litigation against Trans Union in which Cento represented the company…. The district court did not err in finding the disputes here to be factually distinct." *Id.* at 521-522.

What about information that Cento had obtained about Trans Union? The court thought that the "general knowledge and experience Cento gained while defending Trans Union is not the type of confidential information with which Rule 1.9 is concerned." *Id*. at 522. The district court had found that Cento "'undoubtedly did learn some truly confidential information' while working for Trans Union", but it had also found that "the passage of time had removed any substantial

risk that any confidential information from years ago might advance Watkins's litigation." *Id* at 523. The Seventh Circuit said it did not find a clear error or abuse of discretion with respect to that finding. More particularly:

> The district court found here that the passage of time had removed any substantial risk that any confidential information from years ago might advance Watkins's litigation. We do not find a clear error or an abuse of discretion. Not only, as the district court noted, have some 500 opinions been issued since Cento ceased representing Trans Union on "just one of several provisions of the FCRA … that Watkins alleges Trans Union violated," but also, as Cento points out, competitive advantage in credit reporting is created through technological advances, of which there have been many over the last twelve years….. In light of the technological advancements and the sheer number of FCRA claims litigated between the old and new representations, the district court observed that it is not "reasonable to believe that the manner in which [Trans Union] ha[s] handled [litigation] has remained static." … Over ten years have passed since Cento last represented Trans Union. It was not clear error for the district court to find that any confidential information he may have gained during his prior representation has been rendered obsolete.

Id. at 523.

So the court affirmed the decision not to disqualify Cento.

A dissenting judge, Diane Sykes, thought that Cento should have been disqualified. She said, in part:

> Putting all these elements together, Cento is disqualified from this case. For an extended period of time he served as Trans Union's FCRA litigation counsel and in that capacity was deeply involved in defending the agency in hundreds of suits alleging violations of §§ 1681e(b) and 1681i. Legal services of this nature necessarily require broad access to confidential factual information about the client's data-collection and credit-reporting operations, its protocols for ensuring the accuracy of information in credit reports, information relating to the reasonableness of its reinvestigations, and the client's litigation and dispute-resolution strategies. An engagement of this nature and scope also necessarily entails extensive confidential communication with the client's managerial and other staff—as well as in-house counsel—regarding operational and transactional facts and FCRA compliance and risk-avoidance more generally.
>
> My colleagues maintain that much of this information was discoverable and would have been disclosed in the prior litigation…. They also find no error in the district judge's conclusion that any remaining confidential information has become obsolete in the 12 years since Cento last represented Trans Union…. I do not doubt that some of this information would have been turned over in discovery in the prior litigation, and a subset of that discovery material may have found its way into the public court record. But not all. The parties agree that protective orders were used in some cases. And some of the confidential information Cento can be presumed to have acquired would not have been subject to discovery at all—at a minimum, the factual and strategic information

> gleaned from privileged communications with Trans Union personnel, risk analyses, and settlement strategies.
>
> The district judge also concluded that any confidential client information that Cento acquired from Trans Union is surely obsolete due to the passage of time, owing to unspecified "technological advances" and the "sheer number of FCRA claims litigated between the old and new representations." … My colleagues find no abuse of discretion, but I'm not so sanguine. Many of the key Trans Union personnel remain with the company, and Cento worked with them in the prior representation to develop factual records, prepare and defend depositions, devise litigation strategies, and analyze settlement options. The information exchanged in these communications is clearly confidential. We have no nonspeculative basis to declare it irrelevant or obsolete.
> …
>
> Because the nature and scope of Cento's prior work as Trans Union's FCRA counsel was so extensive, there is a substantial risk—even after 12 years—that the confidential client information he learned in the prior representation would materially advance Watkins's position in this litigation. We should reverse with instructions to grant the disqualification motion. I respectfully dissent.

Id. at 530-531.

3. Curing a Conflict

Canta v. Philip Morris USA, Inc.
2017 WL 6598577 (Fla. 3d Dist. Ct. App. 2017)

David and Corazon Canta engaged the the Ferraro Law Firm to represent them in their claims for injuries and damages from smoking cigarettes manufactured by Philip Morris and R.J. Reynolds. In 2015, the Ferraro Firm hired attorney Paulo Lima, who had previously been employed as an associate at Hunton & Williams, LLP. While at that firm, Lima had done work on behalf of Philip Morris in tobacco-related cases. According to the opinion,

> As part of that work, Lima had access to PM's litigation databases and confidential PM documents, and he attended meetings regarding PM's legal strategy and defenses in tobacco cases. Ultimately, the time records disclosed almost 375 hours billed by Lima to PM regarding Engle-progeny cases, and over 1500 billable hours on PM matters in total.

Lima commenced work on tobacco-related cases at his new firm. In 2016, Philip Morris was successful in disqualifying the Ferraro frim from a couple of tobacco-related cases based, at least in part, on the involvement of Lima with the firm. In 2017, Philip Morris brought a motion to disqualify the firm in the Canta case. The following day, the Ferraro firm terminated Lima's employment. The issue on appeal was whether the imputed conflict of interest could be eliminated by discharging Lima.

The trial court concluded that the firm should be disqualified. The appellate court agreed, stating in part:

> We also turn to the preamble to Chapter 4, "Rules of Professional Conduct," directed to all of the Rules discussed in this opinion. The preamble is titled, "A Lawyer's Responsibilities." Within that preamble we find these passages that should guide all lawyers, but seem particularly pertinent in the case of both (1) a lawyer "switching sides" in civil litigation who has acquired confidential information from a former client before joining a new firm that has a public record of pursuing a specific category of claims against that former client, and (2) a new firm which must know, or surely should know, that the new lawyer was with a firm that represented that former client for a course of years, and personally worked on that specific category of cases before the switch.
>
> The preamble explains that "Within the framework of these rules ... many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. ... The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Although we reiterate that Florida has not accepted a so-called "Chinese wall" or "screening" process as a cure-all for lawyers who move to a new law firm with client confidences that might otherwise support disqualification in an existing or new representation by the new firm, the preamble's definition of "screening" is informative: " 'Screening' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law."
>
> Not only did the Ferraro Firm fail to initiate an inquiry and a screening process when Lima joined the firm in 2015, there is no indication that the firm removed Lima from work on Engle-progeny cases for a year after PM detailed the kinds of client confidences Lima's work had included before he switched sides. The preamble states that, "In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening."
>
> Neither Rule 4–1.10(c) nor the comments to the Rule directly address the firm's ability to continue in a matter "representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer" after the formerly associated lawyer has been terminated precisely because his presence resulted in disqualification in other "substantially related" matters. "Unimputing" a conflict seems as implausible as unringing a bell, unscrambling an omelette, or pushing toothpaste back into the tube.

But see Balaban v. Philip Morris USA, Inc., 240 So.3d 896 (Fla. 4th Dist. Ct. App. 2018) (Court remands to consider whether disqualification of Ferraro firm required after Lima terminated from employment, stating, among other things:

> An evidentiary hearing is required in this case to examine the matters dealt with by Attorney Lima during his tenure at the Ferraro firm and the depth of his involvement. Disqualification of the Ferraro firm under Rule 4–1.10(b) would be appropriate should the trial court find that Attorney Lima had significant involvement with Engle-progeny litigation/appeals while with the Ferraro firm and

> that he remained employed by the firm once it knew or should have known of the potential for disqualification….
>
> On the other hand, in a situation where the conflicted attorney had little or no involvement with the matter or matters that created the conflict, had little contact with other firm attorneys working on them, and was then terminated shortly after the conflict came to the attention of the firm, Rule 4–1.10(b), standing alone, would not require the firm's disqualification from the ongoing case.

240 So. 3d at 900).

In re Ace Real Property Investments, LP
2018 W.L. 915192 (Tex. Ct. App. Beaumont 2018) (per curiam)

Ace Real Property Investments sued Cedar Knob Investments, and others, over the purchase of some commercial real estate. Ace claimed that Cedar Knob had provided false or misleading information in connection with the deal. Cedar Knob, in turn, sued Home Run Realty, which had been Ace's broker in the deal.

Attorney Stephen Walker represented Ace. He also filed an answer on behalf of Home Run. Cedar Knob filed a motion to disqualify Walker and his firm, on the theory that Ace and Home Run were opposing parties and that Walker had a conflict of interest in representing both. After this motion was filed, Home Run filed a motion to substitute counsel, which the court granted. Ace filed a response to the motion to disqualify that asserted, among other things, that any temporary conflict had been promptly cured. The trial court judge granted the motion to disqualify Walker, his firm, and co-counsel. Ace filed a petition for writ of mandamus.

Cedar Knob argued that a plaintiff and a third-party defendant are generally adverse to each other. The court of appeals did not decide that issue, but it conditionally granted the writ. It said:

> Assuming without deciding that counsel for Ace violated Rule 1.06 of the Texas Rules of Professional Conduct, Cedar Knob neither alleged nor demonstrated any actual prejudice that requires disqualification; rather, Cedar Knob merely made the general and speculative allegation that counsel's dual representation would prevent a fair resolution of the case and would create the appearance of impropriety…. When the trial court granted the motion to disqualify, the court had already permitted Home Run to retain new counsel of record; therefore, Ace's counsel was no longer representing opposing parties. The trial court abused its discretion by granting Cedar Knob's motion to disqualify…. We conditionally grant Ace's petition for writ of mandamus and direct the trial court to vacate its order granting Cedar Knob's motion to disqualify. The writ of mandamus will issue only if the trial court fails to comply within a reasonable time.

4. Migratory Lawyer

New Horizon Kids Quest III v. Eighth Judicial District Court
392 P.3d 166 (Nev. 2017)

Hall Jaffee & Clayton defended New Horizon Kids Quest III, Inc. in a tort action brought by Robann C. Blue, a minor, through her Guardian ad Litem, Sandi Williamson. Two attorneys at the Hall firm participated in the litigation. The district court dismissed the case with prejudice.

Attorney Jordan P. Schnitzer worked as an associate attorney at the Hall firm for about half of the representation. But Schnitzer did not actually represent New Horizon or obtain confidential information about Horizon while he was with the firm. He then left the Hall firm to join Kravitz, Schnitzer & Johnson, Chtd.

Thereafter, in 2014, Martin J. Kravitz from the Kravitz firm filed a tort action against New Horizon on behalf of Isabella Godoy, a minor, through her mother Veronica Jaime. Kravitz learned that the Hall firm had represented New Horizon in the Blue litigation. He asked Schnitzer about his involvement in the Blue litigation while he was with the Hall firm. Schnitzer told Kravitz that he "had absolutely no knowledge about the Blue case" and confirmed that he had not gained any confidential information concerning New Horizon while at the Hall firm. Kravitz determined screening was not required and permitted Schnitzer to assist on this case.

New Horizon moved to disqualify Kravitz and Schnitzer. Based on Schnitzer's affidavit denying the receipt of confidential information concerning New Horizon, and an affidavit from an attorney at Hall who had participated in the Blue litigation confirming that Schnitzer had not worked on the case, the district court concluded that Schnitzer had not obtained confidential information about New Horizon and denied the motion.

The matter came before the Nevada Supreme Court.

New Horizon argued that a presumption of imputed knowledge required disqualification. The court considered the claim in light of Nevada Rules 1.9(b) and 1.10(a):

> RPC 1.9(b) governs duties to former clients and states that:
>
> A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) Whose interests are materially adverse to that person; and
>
> (2) *About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter*;
>
> (3) Unless, the former client gives informed consent, confirmed in writing.(Emphasis added.) Pursuant to RPC 1.10(a), an attorney's disqualification under RPC 1.9 is imputed to all other attorneys in that disqualified attorney's law firm. However, a disqualified attorney's law firm may nevertheless represent a client in certain circumstances if screening and notice procedures are followed. See RPC 1.10(e).

392 P.3d at 169.

The court analyzed the provisions as follows:

> The plain language of RPC 1.9(b) requires that a lawyer be disqualified if (1) the

current representation is materially adverse to the attorney's former firm's client, and (2) the attorney acquired confidential information about the client that is material to the current representation, unless the attorney's former Firm's client gives informed consent. The requirement that the attorney actually acquire confidential information about his former firm's client is not a presumption; rather, it is a factual matter for the district court to resolve. In the absence of an attorney acquiring such confidential information, it follows that the attorney is not disqualified, and imputed disqualification pursuant to RPC 1.10 does not apply. Therefore, we conclude that the district court appropriately ended its inquiry when it determined that Schnitzer never obtained any confidential information.

Comments by the American Bar Association (ABA) further support our conclusion. RPC 1.9 is identical to the ABA Model Rule 1.9, and thus, the ABA's comments provide clarity to the rule with an instructive example.... The ABA has commented that Rule 1.9(b) only disqualifies a lawyer moving to another firm when that lawyer "has actual knowledge of information protected by [rules of confidentiality]." Model Rules of Prof'l Conduct r. 1.9 cmt. 5 (2016). For example:

> [I]f a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Id. This example is supported with sound reasoning:

[I]t should be recognized that today many lawyers ... move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel. Model Rules of Prof'l Conduct r. 1.9 cmt. 4 (2016).

The court concluded that the district court had not abused its discretion in denying the motion to disqualify.

5. Phone Call

Village of Tinley Park v. Connolly
2018 WL 1054168 (N.D. Ill 2018)

The Village of Tinley Park faced fair housing lawsuits by a housing developer (Buckeye) and the United States. The Village sued former employee Amy Connolly over an alleged breach of fiduciary duties for her role in pursuing a zoning change. The Village sought to disqualify Connolly's lawyer, John Murphey. Murphey has represented various municipalities, including the Village, in matters unrelated to the present case.

> However, in 2016, while he was serving as the Village's attorney on these matters, both Buckeye and the Department of Justice ("DOJ") sued the Village for alleged violations of federal fair housing laws. After DOJ filed its

> lawsuit against the Village, the Village Manager, David Neimeyer, contacted Murphey and set up a phone call for the purpose of discussing the DOJ Case. The call took place on December 9, 2016. In addition to Murphey and Neimeyer, the now-former Mayor of Tinley Park, David Seaman, was also on the call.
>
> The call lasted approximately twenty minutes, during which time the participants discussed the DOJ case and Neimeyer and Seaman provided Murphey with details regarding the Reserve development, which is the subject of both the DOJ and Buckeye Cases. They also provided him with details regarding the DOJ Case. During the conversation, Murphey advised the Village regarding how the DOJ typically handles such cases and at the end of the conversation, recommended the parties settle the matter quickly. Immediately following the call, Murphey sent an email to Neimeyer and Seaman, attaching a sample consent decree with the DOJ, to give them an idea of what a settlement would look like.

With respect to the disqualification motion,

> The Village argues that the Court should disqualify Murphey from representing Connolly because the Village previously shared privileged and confidential information about the DOJ case with Murphey while believing that Murphey was acting as its attorney, and that the DOJ case is substantially related to this case, such that it presents an unresolvable conflict for Murphey.
>
> Connolly argues that Murphey never established an attorney-client relationship with the Village with respect to the DOJ case, and that the Village did not disclose any confidential information to him during his discussions with them regarding that case.

The court concluded that an attorney-client relationship existed between the Village and Murphey during the twenty minute phone call. It was reasonable to infer that confidential information was conveyed to Murphey and it was reasonable for the Village to have believed that Murphey was acting as its attorney.

The court next considered whether the matters were substantially related. It said:

> Here, it seems likely that the Village, believing it was communicating with its lawyer in a privileged and confidential setting, would have disclosed confidential information to aid Murphey in providing useful advice about how they should proceed in the DOJ case. Furthermore, as Connolly has previously told this Court and does not recant or rebut in the opposition to this motion, the DOJ case and the present case are "essentially the same" with respect to the core issues.

The burden shifted to Connolly to rebut the presumption of shared confidences. She was unable to do that. The court disqualified Murphey.

I. Confidentiality

1. Email Issues

ABA Standing Committee on Ethics and Professional Responsibility
Formal Opinion 477 (2017)

In this opinion, the ABA ethics committee updated an earlier opinion on whether lawyers ought to use encrypted email when communicating with clients. The committee observed that "the role and risks of technology in the practice have evolved."

In the earlier opinion, the committee had said:

> Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation.

Quoting from Formal Opinion 99-413 (1999).

Since 1999, the number of devices used to create, store, and transmit confidential communications has grown. And, in 2012, Model Rule 1.6 was changed to add a new duty to part (c) that states "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The committee said that

> lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.

A fact-specific approach is needed. In some circumstances, said that committee, "strong protective measures, like encryption, are warranted." For routine communications with clients, the committee said that "unencrypted routine email generally remains an acceptable method of lawyer-client communication." But it also said that "cyber-threats and the proliferation of electronic communications devices have changed the landscape, and it is not always reasonable to rely on the use of unencrypted email."

The committee said that the following "nonexclusive factors", taken from Comment [18] to Model Rule 1.6, can be guides:

> (1) The sensitivity of the information,
> (2) The likelihood of disclosure if additional safeguards are not employed,
> (3) The cost of employing additional safeguards,
> (4) The difficulty of implementing the safeguards, and
> (5) The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

The committee offered some further considerations as guidance:

> 1. Understand the Nature of the Threat.
> 2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.
> 3. Understand and Use Reasonable Electronic Security Measures.
> 4. Determine How Electronic Communications About Clients Matters Should Be Protected.
> 5. Label Client Confidential Information.
> 6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.
> 7. Conduct Due Diligence on Vendors Providing Communication Technology.

In conclusion, the committee said:

> A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access to information relating to the representation. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

2. Wills

Colorado Bar Association Ethics Committee
No. 132 (2017)

The Colorado Bar Association Ethics Committee looked into some confidentiality issues relating to the drafting of a will. What if a family member, who is disappointed with a gift provided under the will, asks the lawyer who drafted it some questions about the intent of the testator?

The committee initially observed that the duty of confidentiality continues after the death of the client. "Accordingly, a lawyer ordinarily should not disclose client information following a client's death." However

> [i]f the decedent had authorized the drafting lawyer to make such disclosures or if the deceased client's Personal Representative (who holds the rights to the client information) gives consent, then the lawyer may provide an interested party, including a potential litigant, with client information regarding a deceased client's dispositive instruments and intent. This could include prior instruments and communications relevant to those instruments. The disclosure should be no broader than necessary to carry out the decedent's wishes.

Citations omitted.

The committee noted that, in the absence of a disclosure authorization by the client or the personal representative,

there is a split of authority as to whether the lawyer may disclose client information as a matter of ethics. Some authorities contend that such a disclosure would have been "impliedly authorized" by the testator's mere retention of counsel, under the rationale that the testator presumably wanted his or her wishes followed. Other authorities reject this analysis.

Citations omitted. The committee favored the latter approach:

> The Colorado Bar Association Ethics Committee is of the opinion that simply retaining a lawyer to draft estate documents, without more, is not sufficient to constitute implied consent for the lawyer to voluntarily provide information protected by Rule 1.6.
>
> Therefore the safer course of action is for the drafter not to provide such information voluntarily without the consent of either the testator or the Personal Representative. If a court orders the drafting lawyer to disclose information, however, then the lawyer may reveal the information without violating Rule 1.6.

3. Information that is Generally Known

American Bar Association Standing Committee on Ethics and Professional Responsibility
Formal Opinion 479 (2017)

The ABA ethics committee recently considered an issue arising under the duty of confidentiality. It looked at the scope of the exception for use of former client confidential information that has become "generally known".

By way of background, the committee stated:

> Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b). Model Rule 1.9 extends lawyers' duty of confidentiality to former clients….
>
> Model Rule 1.9(c)(2) governs the *revelation* of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not reveal information relating to the representation except as the Model Rules "would permit or require with respect to a [current] client." Lawyers thus have the same duties not to *reveal* former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.
>
> In contrast, Model Rule 1.9(c)(1) addresses the use of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client's representation "to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become *generally known*." The terms "reveal" or "disclose" on the one hand and "use" on the other describe different activities or types of conduct even though they may—but need not—

> occur at the same time. The generally known exception applies only to the "use" of former client confidential information.

Opinion at 1-2 (footnotes omitted).

The committee observed that "[a] number of courts and other authorities conclude that information is *not* generally known merely because it is publicly available or might qualify as a public record or as a matter of public record." But it said that "[a]greement on when information *is* generally known has been harder to achieve." Opinion at 2.

After reviewing what some other authorities had said about the exception, the committee said:

> Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.
>
> Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes. Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).

Opinion at 5 (footnotes omitted).

4. Blogging

American Bar Association Standing Committee on Ethics and Professional Responsibility
Formal Opinion 480 (2018)

Lawyers who comment on legal topics should remember to comply with the applicable Rules of Professional Conduct, including the rules with respect to confidentiality of information relating to

the representation of a client. The ABA ethics committee issued this reminder in the context of a discussion about blogs and other online communications.2

The committee stated that the "confidentiality rule 'applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information." And, "[u]nless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation". Opinion at 2. Even client identity is protected by the rule.

What about information included in a court order? The committee said:

> Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.

Opinion at 3. Footnotes omitted.

The committee also thought that

> A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical. Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.
>
> The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record." Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).

Id. Footnotes omitted.

The committee noted that communications by lawyers are also subject to Rule 3.6, on trial publicity, and Rule 3.5, on impartiality and decorum of the tribunal.

J. Tech

1. Email Troubles

2 Per Formal Opinion 480: "A "blog" is commonly understood to be a website consisting of written entries (posts) regularly updated and typically written in an informal or conversational style by an individual or small group." Formal Opinion 480 at 1, footnote 2.

Alaska Bar Association Ethics Committee
Ethics Opinion No. 2018-1

The Alaska ethics committee looked into some ethics issues related to the use of "cc" or "bcc" elements in email correspondence with opposing counsel. It said that

> [t]he ethical rules implicated are Rule 1.6 (a) (duty to protect client confidences and secrets), Rule 4.2 (prohibiting communicating about the subject of representation with a person the lawyer knows to be represented by another lawyer), and Rule 4.4 (b) (receiving a document relating to the representation of the lawyer's client that was inadvertently sent).

Opinion at 1.

"It should be obvious" said the committee "that a lawyer cannot "cc" opposing counsel's client in a communication without the consent of the opposing lawyer." Opinion at 2. However, it said: "What is less obvious is any duty an opposing lawyer may have when receiving a communication where the sending lawyer has 'cc'd' their own client." Did the sending lawyer, by "cc'ing" his or her own client, thereby give permission to the receiving lawyer to communicate with his or her client about the subject matter of the representation? The committee thought not. Before hitting "reply all", the receiving lawyer should ask whether it is OK to communicate with the sending lawyer's client.

What about using "bcc" to copy your client on a message that goes to opposing counsel? In this instance, your client might inadvertently hit "reply all" in his or her response to you and thereby send some confidential information to the wrong place. As the committee put it: "An unsophisticated client may not realize the effect that the communication may have on disclosing matters that otherwise would be confidential." Opinion at 3.

The committee said:

> Consequently, we recommend that attorneys not "cc" or "bcc" their clients in correspondence with opposing counsel relating to the matter of the representation or that may give rise to a response that could reveal client secrets or confidences. Care should be used if "cc" or "bcc" is used for scheduling or other administrative matters and when permission appears to have been given for ongoing communication. Prudent lawyers will agree to a protocol for "reply all" with opposing counsel.

Opinion at 3.

2. Web Bug

Illinois State Bar Association Committee on Professional Ethics
Opinion 18-01

An Illinois lawyer asked the Illinois State Bar Association ethics committee whether it was permissible to use undisclosed tracking software, also known as "web bugs" or "spymail" in emails or other electronic communications with other lawyers.

The committee described the software as follows:

> The present inquiry involves the use of email "tracking" software, applications that permit the sender of an email message to secretly monitor the receipt and subsequent handling of the message, including any attachments. The specific technology, operation, and other features of such software appear to vary among vendors. Typically, however, tracking software inserts an invisible image or code into an email message that is automatically activated when the email is opened. Once activated, the software reports to the sender, without the knowledge of the recipient, detailed information regarding the recipient's use of the message. Depending on the vendor, the information reported back to the sender may include: when the email was opened; who opened the email; the type of device used to open the email; how long the email was open; whether and how long any attachments, or individual pages of an attachment, were opened; when and how often the email or any attachments, or individual pages of an attachment, were reopened; whether and what attachments were downloaded; whether and when the email or any attachments were forwarded; the email address of any subsequent recipient; and the general geographic location of the device that received the forwarded message or attachment. At the sender's option, tracking software can be used with or without notice to the recipient. There do not appear to be any generally available or consistently reliable devices or programs capable of detecting or blocking email tracking software.

Footnote omitted.

Illinois, like other jurisdictions, has a rule that says it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The committee said:

> The undisclosed use of email tracking software by a lawyer, without the informed consent of the recipient, conceals the fact that the sending lawyer is secretly monitoring the receipt and handling of the email message and its attachments by the original recipient as well as each subsequent receiving party. Any competent lawyer receiving an email from an opposing counsel would obviously wish to know that the opposing counsel is acquiring instantaneous and detailed private information concerning the opening and subsequent handling of the email and its attachments. At a minimum, concealing the use of tracking software constitutes "dishonesty" and "deceit" within the meaning of Illinois Rule 8.4(c).
>
> More fundamentally, this type of deception, if used in email correspondence with another lawyer in the course of representing a client, covertly invades the client-lawyer relationship between the receiving lawyer and that lawyer's client.
>
> …
>
> The undisclosed use of tracking software is contrary to the rationale of Illinois Rule 4.4(b). … [T]hat rule provides that a lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the

> sender…. If the professional conduct rules require lawyers to promptly notify the sender when client confidential information is received by inadvertence, to permit the sender to take protective measures, then those rules should not be interpreted to permit lawyers to procure the same type of information by stealth.
>
> …
>
> Accordingly, if a lawyer wishes to use tracking software in email correspondence with another lawyer in the course of representing a client, the sending lawyer must receive prior informed consent to such use…. Before agreeing to accept email correspondence regarding the representation of a client that may contain tracking software, the receiving lawyer should also obtain the informed consent of any affected client.

Footnotes omitted.

K. Statements About or to Judges

State v. Gast
896 N.W.2d 583 (Neb. 2017)

Attorney William Gast was found to have engaged in misconduct while seeking to remove a judge who presided over his client's case. Gast's client had been accused of converting money that had belonged to an insolvent insurance company.[3] Gast was not pleased with rulings by Judge Bataillon, and filed a motion for recusation. It was based on § 5-302.4 of the Nebraska Code of Judicial Conduct, which states that "[a] judge shall not permit ... social ... interests or relationships to influence the judge's judicial conduct or judgment."

The motion stated, in part:

> This Motion is additionally based upon (among other violations) newly-acquired evidence of this Court's lack of "impartiality," lack of "independence," and lack of "integrity" (as those terms are defined in the Nebraska Code of Judicial Conduct) that existed from soon after the Hon. Peter C. Bataillon inherited this action from the Hon. Michael McGill and that has continuously persisted throughout the period of more than twelve years to the very date of this Motion.

896 N.W.2d at 588. The motion

> further alleged that Gast "very recently acquired reliable information that, for a period of at least twenty years prior to the appointment of ... Judge Bataillon to the Douglas County District Court, a very close personal friendship and continuous social relationship had existed between" Judge Bataillon, Craig, and Craig's cocounsel. The petition alleged that the relationship was never disclosed by Craig or Judge Bataillon and that "the relationship has been improvidently, unethically and continuously concealed by the Hon. Peter C. Bataillon, Craig and [cocounsel] from the time Bataillon inherited this case ... until the very present

[3] Gast's original client, David Fulkerson, died in 2009. Thereafter, his widow Diederike, who was the executor of his estate, was added as a defendant.

> day."

Id. at 577-589.

More specifically, the motion, focusing on the relationship between the judge and opposing counsel Robert Craig, claimed that

> then-attorney Bataillon and Craig played on a summer softball team together "for approximately three years in the 1970s or early 1980s," including socializing after games; attended parties together at the cocounsel's home; and attended dinners at the Omaha Press Club.

Id. at 589.

Following the filing of the motion, Gast sent a letter to Judge Bataillon and Craig that stated, in part:

> Now that the truth of your pre-suit relationship has been discovered, the Docket Sheet itself demonstrates the "cover-up" quality to each and every successive refusal to disclose it after your initial failure to do so. Check it out yourselves. It actually takes on a crescendo-like appearance on its very face. The lesson about cover-ups is that they usually come undone eventually, and the consequences to those involved always amplify in direct proportion to their pre-discovery duration. This "coverup" is more than 12 years old!
>
> Judge, your responsibility is obvious and it is immediate.... You must now recuse *sua sponte*. And I trust that you will not force me to file the augmented Motion, or to conduct a public hearing on it, or to serve the Subpoenas or to take the Depositions.

Id..

The judge held a hearing on the motion. At the hearing the judge said that "[t]he only contact that I had with ... Craig was probably in the early '80s I played on the same softball team with him for maybe a year or two. That's it." *Id.* Attorney Craig did not recall having played on the same softball team with the judge, but had been told by co-counsel that the judge had "played some" on the team. The judge also said, in the hearing, that "[t]his allegation that I failed to disclose, there was nothing to disclose that—that rises to any level under the judicial ethics or any of the lawyers in this matter. As such, your motion is overruled." *Id.*

Following the hearing, Gast sent another letter to the judge, which said, in part:

> Judge Bataillon, you should realize that you have an ever-so-brief opportunity to quietly back out of this case on a purely technical ground, *i.e.* one that is not related to misconduct. Before you elect to pass it [sic] up this chance, I respectfully submit that you think very carefully about your own best interests.

Id. The judge did not recuse himself. He entered judgment for the plaintiff in the amount of $2.2 million, and he later granted the plaintiff's motion for sanctions (of $15,000), concluding that Gast's motion for recusation was groundless and frivolous.

Disciplinary charges were filed against Gast. He was charged with violating two provisions of the Nebraska Rules of Professional Conduct. The first was based on § 3-503.5(a)(1), which provides that "[a] lawyer shall not: (1) seek to influence a judge ... by means prohibited by law". The second was based on § 3-508.2(a), which provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."

Gast admitted that he had violated § 3-503.5(a)(1) by seeking to improperly influence the judge by going "beyond arguing the issues of the case and the facts in evidence therein." But he denied that he had violated § 3-508.2(a). *Id*. at 696.

The case came before the Nebraska Supreme Court. It said, with respect to the first alleged violation:

> We conclude that there is clear and convincing evidence that Gast violated § 3-503.5(a)(1) by attempting to influence Judge Bataillon "by means prohibited by law," that is, by means prohibited by the Nebraska Revised Code of Judicial Conduct and by the Rules of Professional Conduct, when he attempted to convince the judge to grant his motion to recuse and rule in his favor in the case for reasons outside of the evidence in the case and the applicable law, and through extrajudicial communications.
>
> In exhibit A, the memorandum that Gast sent to Judge Bataillon and opposing counsel Craig, he urged the judge to look to the applicable law in the case but then also urged him and Craig to "examine your respective consciences in light of your Christian upbringings." He goes on to write, "I can only speculate as to your personal reasons, but I choose not to. Unfortunately, whatever those might be, they may indeed overwhelm [Diederike's] health. If that happens, how will you feel? Not good, I'm sure." By doing so, Gast urged the judge to decide the case on the basis of his client's health rather than on the evidence in the case and the applicable law.
>
> Gast went on to write, "I only ask now that each of you carefully consider the consequences for not terminating it now, before it gets beyond the control of any of us." He then urged the judge to decide the case on the basis of "how it could impact the integrity and reputation of an otherwise respectable Judgeship."
>
> He then said, "If it is left to the Supreme Court" to reverse on this basis, "it could be very ugly indeed for everyone. Ending it now might allow for some face-saving for all concerned, and for some well-deserved relief for [Diederike]." Here, Gast went beyond urging the court to decide on the basis of the evidence in the case and the applicable law, but to rule in his client's favor for "some face-saving" and for the sake of his client's well-being.
>
> In exhibit C, Gast urged Judge Bataillon to reconsider the denial of his motion to recuse. He wrote to the judge that "you should realize that you have an ever-so-brief opportunity to quietly back out of this case on a purely technical ground, *i.e.* one that is *not* related to misconduct." (Emphasis in original.) Gast then wrote, "Before you elect to pass it [sic] up this chance, I respectfully submit that you think very carefully about your own interests." By writing this, Gast urged

> Judge Bataillon to either "back out of this case on a purely technical ground," presumably on Gast's subject matter jurisdiction argument, and to do so in order to protect the judge's own interests, his reputation.
>
> Within exhibits A and C, Gast urged the judge to decide the case on the basis of the judge's reputation, the judge's "Christian upbringing[ ]," the judge's own interests, and the health and well-being of his client. But a judge is to make judicial decisions on the basis of the facts of the case and the applicable law.
>
> By sending exhibits A and C, Gast violated § 3-503.5(a)(1) by attempting to influence Judge Bataillon to violate the Nebraska Revised Code of Judicial Conduct by deciding the case on improper and legally irrelevant grounds. As advocates, attorneys must "zealously assert[ ] the client's position," but must do so "under the rules of the adversary system," including our ethical rules.
>
> We also pause to make clear that Gast's conduct violated § 3-503.5(a)(1) not only because he went beyond arguing the facts and the law of the case, but because he did so in confidential, out-of-court communications. What made Gast's conduct unethical was that he not only made arguments that went beyond the evidence of the case and the applicable law, but that he went outside of the judicial system and made these improper arguments in private, confidential communications to the judge.

Id. at 595-596.

The court also concluded that Gast had violated § 3-508.2(a). In this connection, it stated, with respect to the alleged "coverup" of the pre-litigation relationship between the judge and opposing counsel:

> At the time he sent exhibit B, Gast's only basis of knowledge upon which he may have reached his conclusion that Judge Bataillon had engaged in a coverup was Gast's wife's conversation with Craig's ex-wife. At the time he sent the letter, he had not followed up with any of the individuals whose names he was given to substantiate the claim that Judge Bataillon and Craig had been friends. None of the facts provided to Gast, as relayed by Gast in his testimony, show anything but a general social acquaintance between the two. They played on the same softball team and socialized with the team and the players' spouses afterward, and also attended some of the same social events. Gast's motion to recuse, filed days before he sent exhibit B, shows that he knew the two played on the same softball team for only 3 years during the 1970's or early 1980's, well over 30 years earlier. He had no evidence of a continuing relationship. Most importantly, Gast had no evidence that either Craig or Judge Bataillon had acted to intentionally cover up any past relationship.
>
> No reasonable attorney would accuse a judge of not only violating his ethical duty to disclose potential conflicts but of covering up a relationship with counsel on the sole basis of knowledge (obtained from the counsel's ex-spouse) that the two had decades earlier been general social acquaintances. No reasonable attorney would conclude that a failure to disclose an acquaintance with counsel from over 30 years ago was due to an attempt to cover up the relationship, rather than because the fact of the acquaintance was trivial or had been forgotten. No

> reasonable attorney would make this accusation without first obtaining a significant factual basis to substantiate it.
>
> But Gast did not substantiate his claim before accusing Judge Bataillon of engaging in a coverup. His letters display an almost conspiracy-theory-like obsession with his belief that Judge Bataillon was biased against him. While any attorney, as a zealous advocate, is disappointed when he or she loses an argument the attorney feels should have been won, Gast's behaviors exceed reasonable conduct. A reasonable attorney would have amassed extensive substantiating evidence before lodging such a serious accusation of bias and unethical conduct against a judge. But Gast took the unremarkable fact of a decades-ago social acquaintance between the judge and counsel to conclude that Judge Bataillon had engaged in a coverup. We find by clear and convincing evidence that Gast made the accusation of a coverup with reckless disregard as to its truth or falsity, in violation of § 3-508.2(a) of the Nebraska Rules of Professional Conduct.

Id. at 597-598.

The court suspended Gast for one year. It also indicated that if he were to apply for reinstatement, reinstatement would be conditioned, in part, on his being on probation for two years.

L. Advocacy

1. Signing Documents

In re Dowd
713 Fed. Appx. 491 (6th Cir. 2018)

In this case,

> Michigan attorney Richard J. Doud appeals from a disciplinary decision of a three-judge panel of the United States District Court for the Eastern District of Michigan. In an opinion and order dated June 23, 2017, the panel found that Doud had violated Michigan Rules of Professional Conduct and suspended him from practicing in the district court for ninety days. Specifically, the court found that Doud, in the process of retiring from the firm in which he was a senior partner and withdrawing from the active practice of law, authorized his firm, for a period of some years, to continue submitting district court filings in his name in numerous cases (Social Security disability benefits appeals), as though he were attorney of record. Although Doud did not admit authorizing this use of his name, he did not deny it, and the finding was clearly supported by a preponderance of evidence. He acknowledged that he did not review filings made under his name and did not supervise the lawyers who actually prepared the filings. Rather, acknowledging that he *may* have authorized this use of his name, he testified that he would have done so simply as a "façade" to help the firm.

713 Fed. Appx. at 491-492. The matter came to the attention of the disciplinary panel after several district judges had observed "marked deficiencies" in filings under Doud's name.

The disciplinary panel concluded that the signing practices "made out violations of Doud's duty of candor toward the tribunal and his duty to supervise attorneys who submitted filings under his name." *Id*. at 492.

The Sixth Circuit affirmed the decision of the disciplinary panel. It also stated:

> A lawyer's good name and professional reputation are his primary stock in trade, an asset to be cultivated and safeguarded throughout his career—even after ceasing the active practice of law. In an era when lawyers are often held in popular disdain, every lawyer should be vigilant to promote the integrity of the profession and the justice system in which we serve. Lawyers do this primarily in their day to day practice through how they meet and counsel clients in need; through how they advocate on their clients' behalf, in communications written and oral, with other lawyers and various tribunals; and through how they refrain from associating their good name with causes and arguments that would bring them and the profession into disrepute.
>
> This case presents a sad example of a decent lawyer, who, in the autumn of a successful career, became careless in permitting the use of his name for improper purposes and needlessly brought dishonor on himself, his firm, the profession, and the justice system. In this appeal, the sadness is compounded by the lawyer's refusal to acknowledge his own misfeasance and his insistence on blaming others. Finding that the appellate arguments warrant only short shrift, we summarily affirm the order of discipline.

Id. at 491.

2. Frivolous Claims

In re Engle Cases
283 F. Supp.3d 1174 (M.D. Fla. 2017)

Attorneys Norwood Wilner and Charlie Farah were found to have committed wrongdoing on a "breathtaking scale" in pursuing frivolous lawsuits related to tobacco related claims. Earlier, the Florida Supreme Court had decertified a class and had required the filling of individual lawsuits.

According to the reported opinion

> In January 2008, Wilner and Farah filed approximately 3,700 Engle-progeny complaints in the Florida state and federal courts. The complaints alleged personal injury, wrongful death, and loss-of-consortium claims related to cigarette smoking. As it turns out, many of the plaintiffs never authorized Wilner and Farah to file a suit. Some had barely heard of them. Dozens did not meet the basic requirements for maintaining an Engle-progeny claim (some of the "personal injury" plaintiffs never even smoked, for example). Over 500 "personal injury" plaintiffs were actually people who had died well before Counsel filed the complaints. Indeed, one of the "personal injury plaintiffs" had died 29 years earlier.

283 F. Supp. 3d at 1183-1184.

> The Court discovered these defects in 2012 only after it sent questionnaires directly to the named plaintiffs—over Counsel's objections. Before the questionnaire process, Wilner and Farah had insisted the Court need not inquire into the status of the plaintiffs; that a questionnaire process would not yield useful information; that there was no sizeable group of cases appropriate for dismissal; and that they could certify in accordance with Rule 11 of the Federal Rules of Civil Procedure that the complaints were viable. It was this obstructive, deceptive, and recalcitrant behavior that, in combination with the hundreds of frivolous complaints, compelled the Court to initiate sanctions proceedings.

Id. at 1184.

With respect to sanctions, the court said:

> The Court has determined that Wilner and Farah violated Rule 11 by advocating 588 personal injury complaints involving dead plaintiffs and 572 cases where the plaintiff never responded to the Court Questionnaire. The Court has also determined that Wilner and Farah violated 28 U.S.C. § 1927 by maintaining these cases, as well as 15 cases that were unauthorized; 18 cases where the plaintiff or decedent was not a smoker; 36 cases where the plaintiff or decedent never lived in Florida; and 28 cases that were previously adjudicated. Alternatively, the Court has the inherent authority to sanction Wilner and Farah for filing and maintaining these cases, as doing so violated the Florida Rules of Professional Conduct and their responsibilities as officers of this Court. Moreover, the Court has the inherent authority to sanction Wilner for misrepresentations made during the June 6, 2011 hearing (Doc. 171) and in his April 6, 2012 Declaration (Doc. 589–1). Due to some overlap between categories of frivolous cases, the total number of sanctionable cases is 1,250. This figure represents about a third of the 3,765 Engle-progeny complaints originally filed.
>
> The Court further determines that monetary sanctions are necessary to impress upon Wilner and Farah, and all others who litigate in this Court, that the Court cannot tolerate the type of conduct they have displayed in these cases. Non-monetary sanctions alone, such as a reprimand, will not suffice. Although the cold transcripts do not reflect it, Wilner's attitude throughout the proceedings has never reflected contrition. During the June 2011 status conference, for instance, Wilner's attitude was one of defiant indignation that the Court would suggest he was unaware of the status of the plaintiffs, as well as condescending assurance that the Court had no reason to worry about the viability of the remaining 2,900 cases. At the December 13, 2016 sanctions hearing, Wilner still did not seem to appreciate how seriously his conduct deviated from professional norms. Nor did Wilner seem to grasp the incredible strains his cavalier approach to filing Engle complaints imposed on the justice system—strains that were magnified by the fact that, at the time, the Middle District of Florida had the ninth heaviest weighted caseload in the country (out of 94 district courts). Counsel's actions also delayed, perhaps by years, plaintiffs with meritorious cases from having their claims heard.

Id. at 1250 (footnotes omitted).

In this instance, the court calculated that the average cost to the public for each tobacco lawsuit was $6,983.42, that the lawyers had filed at least 1,250 frivolous lawsuits, and the "value of Court resources wasted by [their] conduct amounts to $8,729,275." *Id.* at 1254.

> Yet, even this figure inadequately captures the enormity and complexity of the challenges Wilner's and Farah's behavior put before the Court. For nearly two and a half years, from early 2011 to mid–2013, the judges of this Court devoted an incalculable amount of time to parsing through thousands of cases to sort out legitimate cases from illegitimate ones. The Court's efforts, mostly opposed by Wilner, included holding multi-judge panel hearings in June 2011 and June 2012 to address the bloated Engle docket, finding and appointing a Temporary Special Master to assist the Court in coping with case management, ordering Wilner to send questionnaires to the plaintiffs, reviewing the Temporary Special Master's reports and analyses, disposing of the frivolous lawsuits (often over Counsel's opposition, as with the hundreds of cases involving Pre–Deceased Plaintiffs and those where the plaintiff never returned a questionnaire), and various other in-chambers tasks. Other litigants suffered as a result—both within and outside the Engle litigation—because the time and resources the Court had to devote to these tasks could have been spent resolving other cases.

Id. at 1254-1255 (footnotes omitted). The court added $435,129.12 for the value of the labor of the special master in the sanctions investigation. So the total monetary sanction was $9,164,404.12. Since the court was holding in escrow some $45 million in attorneys' fees and costs associated with the various cases, it concluded that the lawyers were able to pay the monetary sanction.

The court was persuaded that a public reprimand was appropriate, so it designated its opinion for publication. And it referred the matter to the Florida Bar for an investigation whether the lawyers had violated the Florida Rules of Professional Conduct.

3. Research by Judges

American Bar Association Standing Committee on Ethics and Professional Responsibility
Formal Opinion 478 (2017)

In this formal opinion, the ABA ethics committee considered the extent to which a judge could conduct an internet search about the facts or the participants in a judicial proceeding.

What is the concern? The committee observed:

> The Internet provides immediate access to an unprecedented amount of information. Internet searches offer a vast array of information on endless topics. Social media sites provide extensive information that users share about themselves and others. Information discovered on the Internet may be highly educational and as useful to judges as judicial seminars and books. But information gathered from an Internet search may not be accurate. It may be biased, unreliable, or false. And, whether truthful or not, information discovered

> by a judge via the Internet that does not qualify for judicial notice and is not disclosed to the parties is untested by the adversary process.

Opinion at 1.

The Model Code of Judicial Conduct has a relevant provision. Model Rule 2.9(C) states: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." And Comment [6] to the rule states that the "prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic."

However, the committee said:

> Importantly, Rule 2.9(C) does not preclude legal research. Rule 2.9(C) carefully proscribes independent research of "facts." Judges may conduct legal research beyond the cases and authorities cited or provided by counsel.

Opinion at 3.

On the matter of judicial notice, the committee referred to Federal Rule of Evidence 201:

> For purposes of this opinion, Fed. R. Evid. 201(b)(1) and (2) contain an appropriate standard; they permit judicial notice of facts which are "not subject to reasonable dispute" because the facts are "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Judicial notice is "founded on the assumption that certain factual determinations are not subject to reasonable dispute and thus may be appropriately resolved other than by the production of evidence before the trier of fact at trial."

Opinion at 4 (footnotes omitted).

The committee distinguished between "adjudicative facts" and "legislative facts". It quoted from an Advisory Committee Note to Federal Rule of Evidence 201(a):

> When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . . . Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.

The committee then explained:

> "Legislative facts," on the other hand, "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." Research of legislative facts does not raise the same due process concerns as research of adjudicative facts.

Opinion at 5 (footnote omitted).

So what is the answer? The committee said:

> Information properly subject to judicial notice is well within the judge's discretion to search and use according to the applicable law. On the other hand, adjudicative facts that are needed to determine an issue in a case, but which are not properly subject to judicial notice, may not be researched without violating Rule 2.9(C). Stated simply, a judge should not gather adjudicative facts from any source on the Internet unless the information is subject to proper judicial notice. Further, and within the guidelines set forth in this opinion, judges should not use the Internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information. The same is true of the activities or characteristics of the litigants or other participants in the matter.

Opinion at 11.

The committee analyzed five hypotheticals, one of which dealt with environmental concerns:

> Hypothetical #2: The judicial district in which the judge is assigned has many environmental contamination cases involving allegations that toxic chemicals have been released and have contaminated soil and groundwater. The judge is unfamiliar with this area of environmental law. Before a case is assigned to the judge, the judge reads online background information including articles. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?
>
> Analysis #2: Judges may educate themselves by independent research about general topics of interest, even on topics that may come before the judge. General background learning on the Internet may be analogized to attending judicial seminars or reading books, so long as there is reason to believe the source is reliable. Even general subject-area research is not permissible, however, if the judge is acquiring information to make an adjudicative decision of material fact.

Opinion at 7 (footnoted omitted).

Another hypothetical concerned an insurance claim:

> Hypothetical #4: A trial judge presiding over an owner's claim for insurance coverage heard testimony from competing experts about their investigation and opinions about the cause of a fire that destroyed plaintiff's property. While preparing findings of fact and conclusions of law the judge received summaries her law clerk created from journals and articles on the proper techniques and analysis for investigating fires of unknown origin. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?
>
> Analysis #4: By searching the Internet for journals and articles on investigating fires, the law clerk engaged in an improper independent factual investigation. The method and extent of the expert's investigation is an issue in dispute, i.e., an adjudicative fact. The respective experts' investigative methods related directly to the weight and credibility given to testimony concerning an adjudicative fact, and fall within the prohibition in Rule 2.9(C). The trial court, therefore, could not properly take judicial notice of these facts as being "not subject to reasonable

> dispute" because they are neither "generally known within the trial court's jurisdiction" nor can they be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). If the summaries addressed material facts in dispute and the judge used the summaries to make findings of fact without allowing the parties to test the factual content of the summaries through evidentiary submissions, the judge violated Model Rule of Judicial Conduct 2.9(A) by considering ex parte information, and violated Rule 2.9(D) by failing to require that the law clerk act in a manner consistent with the judge's obligations under the Code.

Opinion at 8-9 (footnote omitted).

4. Candor to the Court

In re Genis
2017 WL 3382768 (Review Dept. Cal. State Bar 2017)

California disciplinary authorities charged attorney Darrell Genis with seeking to mislead a judge and moral turpitude based on events that took place in a DUI case in which Genis was representing the defendant.

Deputy District Attorney Justin Green called Dean Warden, an expert criminologist, to testify for the prosecution. While Genis was undertaking a cross-examination of Warden, Green "found it helpful to refer to a laminated placard, given to him by a former supervisor, which listed numerous evidentiary objections". According to the opinion in this case:

> During the morning recess, Warden remained seated in the witness box. Greene stepped out of the courtroom, but left his belongings on the prosecutor's table, including his open laptop computer, his trial binders, and his laminated placard. Greene testified he was fastidious with his papers, keeping them in the binders and not loose on the table. He also testified that no one else was sitting with him at the prosecutor's table that day.
>
> During the recess, Genis walked over to Greene's area three times. On each occasion, he looked at Greene's materials, and in one instance, he took out his cell phone and appeared to take pictures. On his third visit to Greene's table, he picked up Greene's laminated placard, looked at it, and then placed it under several papers under the blotter at the end of the prosecutor's table.
>
> At some point, Greene reentered the courtroom and spent the remainder of the recess in the back of the room reviewing emails and texts on his phone.
>
> Trial resumed and Genis continued with his cross-examination of Warden. Greene began looking for, but could not find, his placard of objections. During the lunch break, Greene mentioned the missing placard to Warden. Warden told him that during the morning recess, he saw Genis pick up a sheet of paper from Greene's side of the table, look at it, and then place it under the blotter.
>
> After lunch, when all parties were present and back on the record, Greene brought the matter to the attention of Judge Hill.

Judge Hill asked Genis to respond. Genis asked, “Does that deserve a response?”

> A colloquy ensued. Judge Hill asked Genis twice whether he touched any of Greene's materials. Genis answered “No.” Judge Hill then asked if Genis hid or made any effort to hide Greene's document, and again Genis answered “No.” On the fourth exchange, the following conversation transpired:
>
> > Court: So we can review it ... [Mr. Greene], you're accusing Mr. Genis of going to your placard and touching it and hiding it underneath ... the matt [*sic*] ....
> >
> > Greene: Well, that is what I suspected and then when I spoke to Mr. Warden, Mr. Warden when he was up there noticed Mr. Genis playing around with this and sliding it underneath something. And low [*sic*] and behold when I looked for it underneath ... [.]
> >
> > Court: And you're [Genis] saying that you're categorically denying having done that.
> >
> > Genis: I am categorically denying it.

Unfortunately for Genis, a videotape showed that Genis had hidden the placard and had not been truthful in his responses to the court.

The hearing judge in the disciplinary proceedings concluded that Genis had engaged in “inappropriate sophomoric behavior” and should be admonished. But the review panel concluded otherwise. It said that the “hearing judge seemingly focused on Genis's underlying acts of touching and moving Greene's placard, rather than Genis's false statements to Judge Hill.” It recommended a conditional two-year probation that included an initial sixty-day period of suspension.

5. Behavior in Disciplinary Proceedings

Sarfo v. Commission for Lawyer Discipline
2018 W.L. 1004473 (Tex. Ct. App. Austin 2018); *petition for review filed* (June 6, 2018)

The Texas Commission for Lawyer Discipline filed a disciplinary action against lawyer Samuel Sarfo, alleging professional misconduct connected with an automobile accident case in which Sarfo had represented the defendant. The Commission

> alleged that Sarfo had accepted or continued legal employment in the automobile accident suit which he knew or should have known was beyond his competence …. The Commission also alleged that Sarfo frequently failed to carry out completely the obligations that he owed to his client in the automobile accident suit.

The allegations were tried to a jury.

> As the jury rose to be excused, Sarfo called out, “stupid people.” The trial judge then admonished him, stating that “[i]t was extremely unprofessional, classless and uncalled for, for [Sarfo] to giggle or laugh as [the judge was] speaking to the jury in regards to their verdict.” Sarfo replied that “[he could] laugh anytime he like[d], Your Honor” and that he was “always free to express [his] emotions.” Sarfo thereafter filed a motion for judgment notwithstanding the verdict, which the district court denied.
>
> The district court proceeded to a sanctions hearing. The Commission called its attorney who participated as the second chair during the jury trial and Sarfo by deposition. In his deposition, Sarfo testified that it was “good strategy” to ignore discovery in the absence of a motion to compel and that he had ignored discovery in other cases. The Commission's second chair attorney testified that she observed Sarfo turn toward the jurors and say “stupid people” when they were filing out of the courtroom, call the Commission's lead trial attorney a “stupid, ugly bitch,” and spit at the lead trial attorney twice. The Commission's lead trial attorney also testified about the Commission's incurred attorney's fees and expenses.
>
> The Commission's exhibits admitted during the sanctions hearing included orders and motions in other cases in which Sarfo participated and correspondence between Sarfo and the Commission's lead trial attorney during the pendency of the disciplinary action, including an email with an attached letter from Sarfo to the lead trial attorney. In the email, Sarfo stated that he would “be happy to read [the letter] aloud in open court.” In the letter, Sarfo called the lead trial attorney “the worst lawyer [he had] ever seen,” a “diminutive and unskilled attorney,” “clueless,” and “a complete disgrace and a stigma to a learned profession and a noble calling.” He concluded the letter by wishing her “[g]ood luck” in her “very miserable and fruitless life.”
>
> Sarfo also disparaged and was disrespectful to the assigned judge and a court reporter during the pendency of the disciplinary action.

The jury found that Sarfo “accepted or continued employment in a legal matter for his client which he knew or should have known was beyond his competence; and that, in representing his client, he frequently failed to carry out completely the obligations that he owed to his client.” Following the sanctions hearing, the district court entered a judgment of partially probated suspension. It also ordered Sarfo to “reasonable and necessary attorney's fees and expenses of litigation in the amount of $15,000” as an additional sanction. The suspension order was for one year, with fifteen days of active suspension and 350 days of probated suspension.

The appellate court concluded that the evidence was sufficient to support the jury’s findings. It also rejected Sarfo’s claim that the sanctions against him constituted an abuse of discretion. With respect to sanctions, the court said:

> Here, the evidence before the district court included evidence of Sarfo's professional misconduct during his representation of his client in the automobile accident suit and his conduct during the Commission's disciplinary action.... The evidence was undisputed that Sarfo intentionally placed his client at risk of judgment against the client personally in the automobile accident suit by

> refusing to notify his client's automobile liability insurance carrier, despite admittedly knowing how to do so, and by refusing to comply with the rules of civil procedure, such as intentionally ignoring requests for admission and interrogatories. Sarfo also verbally insulted the judge, the jury, and opposing counsel, including spitting at opposing counsel, during the pendency of the disciplinary action, and he continued to refuse to comply with the rules of civil procedure, such as refusing to provide a privilege log during the pendency of the Commission's disciplinary action despite being subject to an order compelling him to do so.

The court concluded that the district court had not abused its discretion in the assessment of sanctions. And it affirmed the judgment.